ADMINISTRATIVE REVIEW COUNCIL

REPORT TO THE ATTORNEY-GENERAL

REVIEW OF THE ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT

STATEMENTS OF REASONS FOR DECISIONS

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14 February 1991

The Hon Michael Duffy MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

I have pleasure in submitting to you a Report by the Administrative Review Council entitled Review of the Administrative Decisions (Judicial Review) Act; Statements of Reasons for Decisions as adopted by the Council at its meeting on 7 December 1990.

The Report Completes the Council's present review of the Administrative Decisions (Judicial Review) Act 1977.

Yours sincerely

Cheryl Saunders

Professor Cheryl Saunders
President

The members of the Administrative Review Council at the date of the Council's adoption of this report were:

Professor C A Saunders (President)

Justice E A Evatt AO

Justice D O'Connor

Professor D C Pearce

Mr S P Charles QC

Mr C Conybeare

Mr S A Hamilton

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Ms C Petre

Mr A D Rose

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The members of the Committee responsible for overseeing the report at the date of its adoption by the Council were:

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Justice E A Evatt AO

Professor D C Pearce

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The Council expresses its deep gratitude to its former Director of Research,
Mr Denis O'Brien, a Senior Associate with Minter Ellison, Canberra, who had responsibility for preparation of a discussion paper on this matter and preparation of this report.

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SUMMARY

The *Administrative Decisions (Judicial Review) Act 1977* has now been in force for ten years. During that period the number of requests under the Act for statements of reasons for decisions built up to a peak of more than 2 000 in the mid-1980s, but then gradually fell away. In 1989 only 284 requests were made. This is a very low number, especially given that, across the range of Commonwealth administration, probably tens of thousands of decisions affecting the rights or interests of individuals are made every day.

The low level of requests for reasons under the Act is heartening. It provides significant evidence that the legal requirement to provide reasons for decisions upon request has had its desired effect of improving the standards of Commonwealth decision making and of encouraging decision makers to provide adequate reasons for their decisions when those decisions are made.

Against this background, the argument that is sometimes heard about the burden imposed on administrators in complying with requests for reasons rings somewhat hollowly.

The exemption of the classes of decisions set out in Schedule 2 to the Act from the requirement to give reasons also needs to be considered against this background. In recommending that Schedule 2 be repealed, the Council has had regard to the decline in the numbers of requests for statements of reasons. However, the principal reason for recommending the repeal of Schedule 2 is that it is neither logical nor consistent with the requirements of justice to permit aggrieved persons to seek judicial review under the Act but to deny them the right to request reasons.

In making the recommendation that Schedule 2 be repealed, the Council is conscious that, from time to time, certain decisions made by government administrators are based on information which should not in the public interest be disclosed in statements of reasons for the decisions. The report, therefore, makes certain recommendations aimed at bolstering the provisions of section 13A of the Act to ensure that satisfactory provision exists to prevent the disclosure of this type of information.

In the Council's view, the requirements of justice can be met only by ensuring that in every case where judicial review under the Act is available there is also an entitlement to reasons. Exemptions of a class of decisions from the reasons requirement should only be contemplated if there are compelling reasons why that class of decisions should not be amenable to review under the Act. Certain of the classes of decisions presently set out in Schedule 2 should be regarded, in the Council's view, as falling into this category.

Accordingly, in some instances, the report recommends that the decisions concerned be excluded from the scope of the Act as a whole.

LIST OF RECOMMENDATIONS

Recommendation 1: Decisions to which section 13 applies (paras 47-51)

(1) Paragraph 13(11)(a) ought to be repealed.

(2) Paragraph 13(11)(b) ought to be amended along the following lines:

(b) a decision in respect of which a statement has been furnished setting out findings of facts, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

(3) Subsection 26 (1A) of the *Freedom of Information Act 1982* and subsection 40(6) of the *Archives Act 1983* ought to be repealed.

Recommendation 2: Interlocutory relief (paras 59-63)

Section 15 ought to be amended to provide that, without limiting the discretion of the Federal Court under subsection 15(1), a matter to which the Court may have regard in determining whether or not to grant relief under paragraph 15(1)(a) or (b) is whether the person who made application to the Court under section 5 has been given a statement under section 13 in respect of the decision concerned.

Recommendation 3: Power in Court to order statement of reasons (paras 64-67)

Section 13 ought to be amended to provide that, on the application of a person who has made a request under subsection 13(1), being an application made not earlier than 28 days after the making of the request, the Federal Court may make an order directing the giving to the person of a statement under section 13.

Recommendation 4: Tender by decision makers of section 13 statements in judicial review proceedings (paras 8 5-110)

The ADJR Act ought to be amended along the following lines:

- when a copy of a statement furnished under section 13 in relation to a decision is tendered by the decision maker in proceedings under the Act for an order of review in respect of the decision, the copy is admissible as evidence of the reasons for the decision if:
  - (a) the decision maker has given the applicant prior notice of intention to tender the statement as evidence of those reasons; and
  - (b) the applicant does not object to the tender;
- if the applicant objects to the tender, the Federal Court may, at its discretion, give leave to admit the statement into evidence without attendance by the decision maker for examination;
- in exercising its discretion, the Federal Court must take into account:
  - (a) the nature of the grounds of review upon which the applicant relies; and
  - (b) the desirability, in all the circumstances of the case, of the decision maker verifying by affidavit the reasons for the decision;
- if the Federal Court refuses to give leave but the decision maker still wishes to tender the statement the decision maker must verify the statement by affidavit and must be available for cross examination on the statement;
- the weight to be accorded to a statement of reasons tendered by the decision maker is a matter for the Federal Court.

Recommendation 5: Advice of translation facilities (paras 111-114)
If an agency to whom a request for a statement of reasons is made suspects that the first language of the person making the request is not English and that the person may have difficulty in reading English, the agency ought to include with the statement of reasons information in the major community languages about where translation facilities may be found.

Recommendation 6: Personal privacy (paras 121-122)
Section 13A ought to be amended to provide that the section applies in relation to any information to which a request under subsection 13(1) relates, being information which is personal information within the meaning of the *Privacy Act 1988* and which that Act prevents the person to whom the request was made from disclosing.

Recommendation 7: Time limit of 28 days for notice under subsection 13A(3) (paras 127-129)
Section 13A ought to be amended to require any notice under subsection (3) to be given by the decision maker as soon as practicable, and in any event within 28 days, after the receipt of a request under subsection 13(1) for a statement of reasons for the decision.

Recommendation 8: Time limit of 28 days for notice under subsection 14(3) (para 143)
Section 14 ought to be amended to require any notice under subsection (3) to be given by the decision maker as soon as practicable, and in any event within 28 days, after the receipt of a request under subsection 13(1) for a statement of reasons for the decision.

Recommendation 9: Information prejudicing enforcement of the law or protection of public safety (paras 144-145)
Section 13A ought to be amended to provide that the section applies in relation to any information to which a request under subsection 13(1) relates, being information which would, or could reasonably be expected to:

(a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;
(b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law;
(c) endanger the life or physical safety of any person;
(d) prejudice the fair trial of a person or the impartial adjudication of a particular case;
(e) disclose lawful methods or procedures for preventing, detecting, investigating or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
(f) prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

Recommendation 10: Information relating to the competitive commercial activities of an agency (paras 168-173)
Section 13A ought to be amended to provide that the section applies in relation to any information to which a request under subsection 13(1) relates, being information which would, or could reasonably be expected to, adversely affect an authority of the Commonwealth in respect of its competitive commercial activities.

Recommendation 11: Repeal of Schedule 2 (paras 174-179)
Schedule 2 ought to be repealed.

Recommendation 12: Exclusion of classes of decisions by regulation (paras 180-182)
Subsections 13(8), (9) and (10) ought to be repealed.

Recommendation 13: Returns concerning use of section 13 (paras 183-189)

(1) All government agencies ought to keep records concerning the use of section 13, which record:
   (a) the number of requests made for statements of reasons;
   (b) the number of requests refused and the grounds of refusal;
   (c) the number of statements of reasons where information to which section 13A applies was not included and the grounds for its non-inclusion;
   (d) the number of cases where the Attorney-General gave a certificate under section 14.

(2) Annual returns setting out this information should be included in the annual reports of agencies.

Recommendation 14: Defence Force personnel management decisions (paras 191-197)
Schedule 1 to the ADJR Act ought to be amended to include decisions in connection with personnel management (including recruitment, training, promotion and organisation) with respect to the Defence Force, including decisions relating to particular persons.

Recommendation 15: Consular and diplomatic privileges and immunities decisions (paras 198-202)
Schedule 1 to the ADJR Act ought to be amended to include decisions under the *Consular Privileges and Immunities Act 1972*, the *Diplomatic Privileges and Immunities Act 1967* and the *International Organisations (Privileges and Immunities) Act 1963*.

Recommendation 16: Certain decisions under the Migration Act (paras 203-213)
Section 13 ought to be amended to provide that, in spite of any other provision of the ADJR Act, a person is not entitled to make a request under subsection (1) in relation to a decision under section 34 of the *Migration Act 1958* or in relation to a decision concerning the issue or cancellation of a visa unless the person is aggrieved by the decision and was, at the time of the decision:

- the holder of a valid visa; or
- an Australian citizen or an Australian permanent resident (as defined in the Migration Regulations).

Recommendation 17: Appropriation decisions (paras 231-238)
Schedule 1 to the ADJR Act ought to be amended to include decisions of the Minister for Finance to issue sums out of the Consolidated Revenue Fund under an Act to appropriate moneys out of that Fund for the service of, or for expenditure in respect of, any year.

Recommendation 18: Certain decisions under Audit Act (paras 239-243)
Schedule 1 to the ADJR Act ought to be amended to include decisions under section 32 or 36A of the *Audit Act 1901*.

Recommendation 19: Decisions to which section 13 applies to exclude decisions the terms of which are tabled in Parliament (paras 244-253)
Subsection 13(11) ought to be amended to exclude from the definition of decision to which section 13 applies a decision the terms of which are required by an enactment to be laid before each House of the Parliament and a decision the terms of which are laid before each House of the Parliament pursuant to a power conferred by an enactment.

Recommendation 20: Decisions of certain remuneration tribunals (paras 254-258)
The Acts establishing the Defence Force Remuneration Tribunal and Remuneration Tribunal ought to be amended to require the decisions of those tribunals to be accompanied by a statement of reasons.

Recommendation 21: Information affecting management of economy (paras 260-262)
Section 13A ought to be amended to provide that the section applies in relation to any information to which a request under subsection 13(1) relates, being information which would, or could reasonably be expected to, prejudice the ability of the Commonwealth Government to manage the Australian economy.

Recommendation 22: Decisions relating to the making or terminating of appointments of departmental secretaries (paras 288-291)
Schedule 1 to the ADJR Act ought to be amended to include decisions relating to the making or terminating of appointments of Secretaries under the *Public Service Act 1922*.

Recommendation 23: Decisions to engage staff or to terminate their engagement under the Members of Parliament (Staff) Act (paras 295-296)
Schedule 1 to the ADJR Act ought to be amended to include decisions engaging consultants or staff under the Members of Parliament (Staff Act 1984 and decisions terminating their engagement.

Recommendation 24: Certain taxation decisions (paras 307-323)
(1) Subsection 14ZD(2) of the *Taxation Administration Act 1953* ought to be amended to omit the reference to section 28 of the *Administrative Appeals Tribunal Act 1975*.
(2) Subsection 13(11) of the ADJR Act ought to be amended to exclude from the definition of decision to which section 13 applies a decision making an assessment under the *Income Tax Assessment Act 1936*.
(3) The exclusion from the definition of decision to which section 13 applies set out in sub recommendation (2) ought to be removed upon the implementation of full self assessment under the Income Tax Assessment Act.

Recommendation 25: Statutory decisions of the Governor-General (paras 338-341)
The ADJR Act ought to be amended to provide that, for the purposes of the application of section 13 to a decision of the Governor-General, the Minister responsible for the advice tendered to the Governor-General is to be deemed to be the person who made the decision.

Recommendation 26: Reports or recommendations to be treated as conduct (paras 354-371)
Subsection 3(5) ought to be amended to include a reference to the making of a report or recommendation in references in the Act to conduct engaged in for the purpose of the making of a decision.

INTRODUCTION

1. This report completes the Council's present review of the *Administrative Decisions (Judicial Review) Act 1977* ('ADJR Act'). The review has been conducted in stages. The first stage was the subject of the Council's Report No 26, *Review of the Administrative Decisions (Judicial Review) Act 1977. Stage 1*. That report was transmitted to the Attorney-General in August 1986 and was tabled in the Parliament on 25 November in that year. The second stage of the review was completed with the transmission to the Attorney-General in 1989 of Report No 32, *Review of the Administrative Decisions (Judicial Review) Act: the Ambit of the Act*. That report was tabled in the Parliament on 8 June 1989.

2. The stage one report was prepared in response to claims that, in certain areas, the ADJR Act was being used to delay or frustrate Commonwealth administration. The report recommended amendments to the Act by which the Federal Court's powers could be extended or clarified to enable it to stay or refuse to grant applications for review in appropriate cases. The government, in response to the Council's report, introduced into the Parliament the *Administrative Decisions (Judicial Review) Amendment Bill 1987*. The Bill went somewhat further than had been recommended by the Council in dealing with the powers of the Federal Court to refuse or stay applications for review. Following concerns about the Bill expressed in a report of the Legal and Constitutional Affairs Committee of the Senate, the Bill was defeated in the Senate.

3. The second stage report dealt with the ambit of the ADJR Act for judicial review purposes. Closely associated with the availability of review is the issue of the ambit of that part of the Act which confers on a person whose interests are affected by an administrative decision a right to obtain upon request a statement of reasons for the decision. Understandably, the government decided that it would not respond to the second stage report until the Council's present report on statements of reasons had been completed.

4. As with the earlier stages of the review of the ADJR Act, the present report was preceded by the circulation by the Council of a discussion paper on the issues under consideration. The discussion paper is referred to at various instances in this report. The persons or bodies who made submissions in response to the discussion paper are listed in Appendix A to the report. The Council takes this opportunity to express its gratitude to all those who made submissions. All the submissions have considerably assisted the Council in formulating the conclusions reached in the report.

CHAPTER I

THE BASIS OF THE RIGHT TO OBTAIN REASONS FOR DECISIONS

5. The introduction in the Commonwealth administrative law package of the 1970s of a statutory obligation imposed on decision makers to give reasons for their decisions upon request has properly been regarded as one of the most significant reforms contained in the package. In a memorandum produced by the Council in November 1978 to explain the statements of reasons requirement, the Council said that the requirement was intended:

- to overcome the real grievance persons experience when they are not told why something affecting them has been done (see *Palmer and the Minister for the Capital Territory* (1978) 23 ALR 196, 206)
- to enable persons affected by a decision to see what was taken into account and whether an error was made so that they may determine whether to challenge the decision and what means to adopt for doing so (see *Ansett Transport Industries (Operations) Ltd v Secretary, Department of Aviation* (1987) 73 ALR 193).

(The explanatory memorandum is set out in full in the Council's *Third Annual Report 1979*, Appendix 2 and in Pearce, *The Australian Administrative Law Service*, vol 1, 5003.)

6. Fundamentally, the obligation to provide reasons upon request is aimed at enhancing administrative justice. It promotes the ideal of justice being done and being seen to be done. In the 1989 Blackburn Lecture, the Chief Justice of the High Court of Australia, Sir Anthony Mason, said that the creation of the obligation to provide statements of reasons for decisions 'was a dramatic advance in arming the individual with effective remedies in the overall scheme to ensure administrative justice' and that 'reasoned and principled administrative decisions are an indispensable element in a modern democracy'.

7. The Commissioner of Taxation in a special income tax ruling (Miscellaneous Taxation Ruling No MT2037) dealing with statements of reasons has said that, from the point of view of good administration, the existence of an obligation to provide reasons upon request is aimed at:

- stimulating the decision maker to consider carefully the lawfulness and correctness of the decision to be made in the circumstances and thereby improving the quality of decision making
- ensuring that decision making rests on a rational foundation by stimulating the decision maker to identify and formulate the reasons which motivate the decision.

8. There is no doubt that an awareness by decision makers that they may have to justify their prospective decisions through the provision of a statement of reasons contributes to a better standard of decision making. The improvement in decision making standards has been attested to by senior administrators (see Volker, 'The Effect of Administrative Law Reforms', *Canberra Bulletin of Public Administration*, April 1989, 112) and several of the submissions made on the Council's discussion paper referred to this point. The Australian Customs Service in its submission said:

> . . . the provision of a s.13 statement is now an accepted and valuable means of advising potential litigants of the basis of a decision affecting them. It also has the clear benefit of

> requiring decision makers to set out in a logical and precise form the steps in their decision making process.

9. The furnishing of reasons for a decision may also help to prevent unnecessary appeals or complaints in connection with the making of decisions. In the Ombudsman's *Second Annual Report 1979*, made at a time before the reasons requirements under the administrative law package had come into force in any comprehensive way, the Ombudsman mentioned the large number of complaints made to his office which were the result of the complainant having been given inadequate explanations of action taken by administrators (p. 7). The prevention of unnecessary appeals or complaints through the provision of statements of reasons contributes to more efficient administration.

10. From time to time, the contrary view has been put that the requirement to provide statements of reasons for decisions is inimical to public sector efficiency. Such a view was expressed in 1988 by Sir William Cole, a former Secretary to the Department of Defence and former Chairman of the Public Service Board. He referred to statements of reasons requirements as one factor undermining public service efficiency. He indicated that there was a need to couch reasons given under the ADJR Act in legalistic terms 'because a recipient can, and often does, appeal to the courts and the courts run along tram tracks which require them to see reasons couched in that artificial way' (R W Cole 'The Public Sector: The Conflict Between Accountability and Efficiency', *Australian Journal of Public Administration*, September 1988, 223, 227).

11. The Council does not accept this view. In the first place, it is not consistent with the comments which the Federal Court has made about the requirement to provide reasons. In *ARM Constructions Pty Ltd v Deputy Commissioner of Taxation* (1986) 65 ALR 343, 349 the Federal Court said:

> All it [section 13] requires to be set out is a statement of the matters the administrator must have considered in making the decision in the first place - what he found the facts to be, what material he considered in arriving at those findings, and the reasons for his ultimate decision. It would be wrong for courts to construe reasons in an overly critical spirit, forgetful that they are the reasons of an administrator, not of the draftsman of an Act. But it would be as bad to betray the aims of the Administrative Decisions (Judicial Review) Act by ignoring what has been required by the Parliament to be disclosed in the interests of just and lawful (and not merely unassailable) administration.

12. In *Ansett Transport Industries (Operations) Limited v Taylor* (10 April 1987) the Federal Court said:

> Section 13 seeks to strike a balance between the requirements that persons affected by an administrative decision know the basis upon which it was made and the necessity that the administration of this country be carried on effectively without undue intervention by the courts in the administrative process.

13. Sir William Cole's criticism also overlooks the positive impact that the requirement to provide statements of reasons has had on public sector administration.

14. While the provision of statements of reasons for decisions necessarily contributes to the cost of government, there is, as the Attorney-General's Department said in its submission, 'an obvious social justice benefit in aggrieved individuals having an entitlement to a statement of reasons'. Furthermore, the economic costs of a statutory regime for the giving of reasons need to be balanced against the economic benefits of such a regime. Those economic benefits flow from the avoidance of a commitment of resources to deal with

unnecessary complaints about administrative action and unnecessary challenges to such action.

15. The right to reasons has sometimes been regarded as the third principle of natural justice, the first two being the right to be heard in appropriate cases and the right to have a decision made without bias. Sir William Wade has said, 'the giving of reasons is required by the ordinary man's sense of justice' (Wade, *Administrative Law*, 6th ed., 1988, 548). In *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 Lord Denning said that if a person seeks a privilege to which he has no particular claim, such as an appointment to a post, he can be refused the privilege without being given any reason. If, on the other hand, a person is to be deprived of a right or interest or legitimate expectation, he is entitled to be told the reasons and to be given the chance of being heard. For, said Lord Denning, 'the giving of reasons is one of the fundamentals of good administration' (p. 191).

16. It has long been accepted as an incident of the judicial process in common law jurisdictions that the courts must give reasons for their decisions: *Pettitt v Dunkley* [1977] 1 NSWLR 376; *Housing Commission of NSW v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 386; *Connell v Auckland City Council* [1977] 1 NZLR 630. The *Administrative Appeals Tribunal Act 1975* ('AAT Act') requires the AAT to give reasons for its decisions (s.43(2)). A failure of the AAT to deal in its reasons with an important submission that has been made to it will constitute an error of law: *Dennis Wilcox Pty Ltd v FCT* (1988) 14 ALD 794.

17. However, in *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 the High Court of Australia rejected the proposition that there is a general duty at common law to give reasons for an administrative decision. The High Court unanimously overruled the Court of Appeal of New South Wales which had held that the common law concerning administrative review had developed to such an extent that natural justice imposed an obligation upon the Public Service Board of New South Wales to provide reasons for certain decisions in a promotion appeal in the absence of an express statutory requirement to do so.

18. In *Ricegrowers Co-operative Mills Ltd v Bannerman and Trade Practices Commission* (1981) 38 ALR 535, 548 Justice Northrop referred to the statements of reasons provisions in the ADJR Act as creating a new series of rights expressly conferred by that Act. The new series of rights was aimed at remedying the deficiency in the common law.

19. The basis on which the ADJR Act creates a right to obtain reasons does not depend entirely on natural justice concepts. The effect of section 13 of the Act, when read with section 5, is to confer the right on a person who is 'aggrieved' by a decision to which the Act applies. Subject to some exceptions, any decision of an administrative character made under an enactment meets the description of a decision to which the Act applies. By virtue of subsection 3(4) of the Act, the reference to a person aggrieved by a decision includes a reference to a person 'whose interests are adversely affected by the decision'. This standing test is to be given a liberal construction: *Australian Conservation Foundation v Minister for Resources* (1990) 19 ALD 70.

20. One virtue of this criterion for the operation of the reasons entitlement is that it provides for decision makers a more readily understandable basis of operation than would be the case if the entitlement were expressed to depend upon whether the person who made the decision was required to observe one or more of the rules of natural justice. Although the common law seems to be moving to a position where the requirements of procedural fairness are, in the absence of clear contrary legislative intent, 'recognised as applying

generally to governmental executive decision making' (*Haoucher v Minister for Immigration* (1990) 93 ALR 51, 53 per Justice Deane), that position would not yet seem to have been reached. Consequently, if the entitlement to reasons were to be limited to those decisions which attract one or more of the rules of natural justice, jurisdictional uncertainty would arise. The situation under the *Administrative Law Act 1978* of Victoria illustrates the problem. In that State, where both the right to obtain judicial review and the right to obtain a statement of reasons turn, in effect, upon whether the person or body which made the decision was bound to accord natural justice, there have been numerous cases in which that question has had to be determined (see Kyrou, *Victorian Administrative Law*, paras 3094-3096).

21. This experience suggests that a statutory entitlement to reasons ought not to be constructed solely on the basis of the making of an assessment whether the particular decision attracts one or more of the rules of natural justice. On the other hand, the existence of an entitlement to natural justice in a particular case will provide a strong argument for ensuring that that case is covered by the statutory entitlement to reasons, however that entitlement may be framed.

22. In *Burns v Australian National University* (1982) 40 ALR 707, 715 Justice Ellicott explained the basis of the reasons entitlement in the ADJR Act as follows:

> Section 13 is clearly designed to enable a citizen whose interests are adversely affected by a decision to which the section applies, to obtain a statement in writing concerning the reasons for it in the terms specified in sub-s(1). It confers a basic right which the citizen previously did not have except where legislation expressly required it or the application of rules of natural justice demanded it. Those exercising administrative power under Commonwealth enactments were not under a general duty to give reasons. Up to a point, they were entitled to hide behind a wall of silence. A citizen adversely affected could, of course, attempt to use the prerogative writ procedure to establish that a decision was defective, but this procedure was unlikely to be of value if the reasons for the decision could not be proved. Therefore prior to the enactment of s.13, a person whose interests were adversely affected by an administrative decision might be deprived of a remedy, even though the decision was actually defective in law. It was largely to remedy this situation that the section was enacted.

23. Although the right to a statement of reasons conferred by the ADJR Act is not founded entirely on natural justice obligations, the operation of section 13 as a catalyst in developing the law concerning natural justice should be noted. In a line of cases before *Kioa v West* (1985) 159 CLR 550 the High Court had said that the exercise of the power of the Minister for Immigration to order the deportation of a person under the Migration Act was not conditioned on the according of natural justice. One reason why the High Court had reached that conclusion was that the Minister was under no obligation to give reasons for his decision. However, in *Kioa's Case* the High Court noted that, upon the coming into force of the ADJR Act, reasons were required to be given upon request. That factor was influential in leading a majority of the Court to the conclusion that the Migration Act did not displace the duty to act fairly in accordance with the doctrine of natural justice. In respect of the deportation power, Justice Mason said (pp 585-6):

> The exercise of the power is susceptible of judicial review and an element in that review is the obligation, on request, to furnish a statement setting out material questions of fact, referring to the evidence and other materials, and giving the reasons for the decision. In the light of this it can scarcely be suggested now that the existence of an obligation to comply with the requirements of procedural fairness is inconsistent with the statutory framework.

CHAPTER 2

ELEMENTS OF SCHEME UNDER ADJR ACT FOR OBTAINING REASONS

The Statutory Scheme in the Commonwealth Concerning Reasons

24. The scheme under the ADJR Act relating to reasons for decisions is part of a wider scheme in the Commonwealth concerning the giving of reasons for decisions. The wider scheme has various elements:

- Section 28 of the AAT Act provides that, in relation to a decision which the Tribunal has jurisdiction to review, a person who is entitled to apply to it for a review is also entitled to be furnished by the decision maker upon request with a statement of reasons for the decision.
- Section 13 of the ADJR Act imposes a similar obligation upon a decision maker in relation to a decision to which the section applies. The section is set out in full in Appendix B. A decision to which the section applies must, first of all, be a decision to which the Act applies. Schedule 1 to the Act (which is set out in Appendix C) excludes certain classes of decisions from the ambit of the Act.
- Several statutes provide an entitlement to a statement of reasons for a decision made under the statute, eg, section 26 of the *Freedom of Information Act 1982* ('FOI Act').
- Section 25D of the *Acts Interpretation Act 1901* provides that, where an Act requires reasons to be given, the instrument giving the reasons must also set out the findings on material questions of fact and refer to the evidence on which those findings were based.
- Both section 28 of the AAT Act and section 13 of the ADJR Act contain provisions which absolve the decision maker from the requirement to provide reasons if a reasons statement has been provided together with the decision concerned.
- Both section 28 of the AAT Act and section 13 of the ADJR Act contain provisions that allow a person to seek further and better particulars if the statement of reasons is not adequate.
- Paragraph 15(2)(e) of the *Ombudsman Act 1976* authorises the Ombudsman to make a report where he is of the opinion that reasons should have been, but were not, given for a decision of a department or agency.

Elements of Scheme Under ADJR Act

25. As was mentioned in chapter 1, there is no general rule of the common law or principle of natural justice that requires decision makers to give reasons for their decisions. Section 13 of the ADJR Act sets out the limits of the legal obligation imposed on decision makers to provide statements of reasons for decisions. In *Murchison v Keating* (1984) 54 ALR 380 the Federal Court said that, where an application is made to the Court for a review of a decision that does not fall within the scope of section 13, the Court has no inherent power to make an order requiring the provision of reasons.

26. The right under section 13 to obtain reasons for decision may be exercised independently of any application to the Federal Court for an order of review. The right can, however, be exercised as an adjunct to judicial review proceedings. In some cases, the reasons as stated in the reasons statement may assist greatly in the establishment of grounds

for a successful judicial review application. An illustration is provided by the case of *Srokowski v Minister for Immigration Local Government and Ethnic Affairs* (1988) 15 ALD 775 where, having regard to the statement of reasons that was furnished for a decision not to release a person from custody, Justice Lee said (p. 779):

> The mere recitation of the reasons shows that the authorised officer's discretion has miscarried. The reasons display no assessment of some most important and relevant considerations, such as the inordinate period of imprisonment, the lack of imminence of deportation and the indefinite prospect of any arrangement for deportation being effected in consequence of the applicant's loss of his native citizenship. Furthermore, the reasons show no consideration of whether suitable conditions could be imposed and appropriate security obtained to secure compliance with these conditions.

27. The link between reasons and review was discussed by the full court of the Federal Court in the following terms in *Minister for Immigration, Local Government and Ethnic Affairs v Pashmforoosh* (1989) 18 ALD 77, 80:

> Federal legislation emphasises the need for reasoned decision making . . . . Thus, decisions may be set aside because, being insufficiently supported by reason, they appear to be an improper exercise of the power conferred or arbitrary or because there was no evidence or other material sufficient to justify the making of the decision or the decision was so unreasonable that no reasonable person could have so exercised the power. The making of, or failure to make, a particular finding of fact in the course of the reasoning process may equally be attacked on any such ground. The taking into account of a fact found unreasonably or the failure to take into account a fact that a reasonable decision maker would have found and taken into account provides a ground of review under ss.5(1)(e) and 5(2)(a) and (b) of the ADJR Act.

28. The High Court in *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11 expressed agreement with this statement to the extent that a finding of fact constitutes a 'decision' within the meaning of the ADJR Act. But, said

> the High Court (at p. 40), if the finding does not constitute a 'decision', it is beyond review under the ADJR Act independently of any final decision. Later in this chapter the ABT Case and its implications for section 13 are further examined.

29. Until section 13 was enacted, the absence of reasons shielded many administrative decisions from judicial review. As Justice Brennan said in *Kioa v West* (1985) 159 CLR 550, 625, the absence of reasons was 'often irremediable by discovery'. The powers of the courts to order discovery and inspection have a different purpose from provisions requiring the giving of a statement of reasons. In the context of the ADJR Act, the purpose of a statement of reasons under section 13 is to ensure that a person who is entitled to apply to the Federal Court under section 5 for an order of review may be furnished with a statement of the findings and reasons for the decision so that the person may be in a position to consider a challenge or prospective challenge to the decision. Discovery and inspection are processes of the Court itself by which a party may obtain from the opposite party documents relating to issues between them for the purpose of preparing for the trial of the action. Discovery and inspection may be ordered notwithstanding the fact that a statement of reasons under section 13 has been supplied by the decision maker: *Federal Commissioner of Taxation v Nestle Australia Ltd* (1986) 69 ALR 445.

30. A statement of reasons for decisions may, of course, open the way to discovery. Whereas, before section 13 was introduced, judicial review by the courts was capable of being frustrated because the basis of the decision concerned was often unable to be ascertained, the provision of a statement of reasons will open a window to information that was available to the decision maker in the making of the decision.

Section 13

31. The right under section 13 to a statement of reasons is conferred upon any person who is entitled to apply to the Federal Court for an order of review under the Act in relation to a decision to which the section applies. The right to reasons does not extend to conduct related to the making of a decision (s.6) nor, obviously enough, to a failure to make a decision (s.7). The fact that a decision maker has furnished reasons pursuant to section 13 does not constitute an acceptance by the decision maker that the decision is reviewable under the ADJR Act. In *Clamback v Coombes* (1987) 78 ALR 523 the Federal Court said that it was better for persons affected by decisions to be supplied with reasons even though it may be doubtful whether they are entitled to them and there will be no estoppel against the Commonwealth in such a case.

32. The statement to which a person seeking reasons is entitled is 'a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision' (s.13(1)).

Decisions to which section applies

33. Subsection 13(11) defines a decision to which section 13 applies as, first of all, a decision to which the Act applies. This automatically rules out the classes of decisions in Schedule 1 to the Act. The subsection also excludes from the scope of section 13:

- a decision to which section 28 of the AAT Act applies;
- a decision that includes, or is accompanied by a statement setting out, findings of fact, a reference to the evidence or other material on which those findings were based and the reasons for the decision;
- a decision included in any of the classes of decision set out in Schedule 2.

34. The scope of the expression 'decision to which the Act applies' was considered in the Council's report, *Review of the Administrative Decisions (Judicial Review) Act: the Ambit of the Act*. The report recommended that the definition of decision to which the ADJR Act applies be amended to include a decision of an administrative character made by an officer of the Commonwealth under a non-statutory scheme or program the funds for which are authorised by an appropriation made by the Parliament for the purpose of the scheme or program. This would have the effect of bringing some non-statutory decisions within the ambit of the Act. The report also recommended that statutory decisions of the Governor-General be brought within the ambit of the Act and that many of the paragraphs of Schedule 1 be repealed. The latter recommendation would also enlarge the ambit of the Act by bringing within it the classes of decisions referred to in those paragraphs. The implications for the provision of statements of reasons of these recommendations are considered in chapter 6 of the present report.

35. The decision of the High Court in *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11 needs to be taken into account when considering the extent of the categories of decisions to which section 13 applies. Until the High Court decision in that case it could be said that every decision of an administrative character made under an enactment (apart from decisions falling within the specifically excluded classes) attracted the reasons requirement. This result flowed from the decision of the full court of the *Federal Court in Lamb v Moss* (1983) 49 ALR 533. In that case the Federal Court stated (p. 556):

> In our opinion, there is no limitation, implied or otherwise, which restricts the class of decision which may be reviewed to decisions which finally determine rights or obligations or which may be said to have an ultimate and operative effect.

36. The nexus in the ADJR Act between the reviewability of decisions and their amenability to the statements of reasons requirement meant that what the Federal Court said in that case about the scope of review applied equally to the scope of the reasons requirement.

37. In the *ABT Case*, however, the High Court interpreted 'decision' in the ADJR Act in a narrower way. Chief Justice Mason said (p. 23) that a 'decision':

> . . . will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a reviewable decision, unless the statute provided for the making of a finding or ruling on the point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment.

38. The Chief Justice went on to say that another essential quality of a reviewable decision is that it be a substantive determination.

39. The *ABT Case* will clearly prove to be a seminal case on the meaning of 'decision' under the ADJR Act. Given the range of decision making circumstances that arise under Commonwealth enactments, it can be expected that the principles enunciated in the case will undergo exploration and further development in other cases.

40. From the point of view of the administrator it may be observed that the High Court's decision has the effect of narrowing the kinds of decision to which the Act applies. However, the decision also has the effect of creating a category of decision making to which the application of the Act is less clear cut. The decision of the full court of the Federal Court in *Edelsten v Health Insurance Commission* (1991) 96 ALR 673 illustrates the potential difficulty.

41. The appeal in that case involved two decisions taken in the process of a reference to a Medical Services Committee of Inquiry of suspected excessive servicing by Dr Edelsten. For both decisions a statutory basis could be found. The first decision was a decision of a senior medical officer within the Health Insurance Commission to refer information disclosed in an investigation by it to a delegate of the Minister. The second decision was the decision of the delegate to refer the matter to the Committee of Inquiry. The Committee of Inquiry is given the task under the *Health Insurance Act 1973* of determining whether or not excessive servicing has occurred. The Act contains provisions ensuring that, in an inquiry by the Committee, natural justice is accorded to the practitioner concerned. The Act also contains provisions enabling review to be sought of a determination of the Minister made under section 106 of the Act following a report of the Committee.

42. The full court of the Federal Court found that neither decision in respect of which Dr Edelsten had sought an order of review was a reviewable decision for the purposes of the ADJR Act. Justices Northrop and Lockhart said (pp. 682-683):

> *Bond* is authority for the principle that generally, for a decision to be reviewable under the *Judicial Review Act* it must have a quality of finality, not being merely a step taken on the way to the possible making of an ultimate decision; and it must have the essential quality of being a substantive as distinct from a procedural determination. The rationale

> underlying Bond is that Parliament could not have intended the *Judicial Review Act* to be a vehicle for judicial review of every decision of a decision-maker under a Commonwealth enactment. Some decisions will have real impact upon a person's rights, privileges or obligations; some will have no such impact, whilst others are mere stepping stones which may lead ultimately to the making of a decision which does affect the person's position.

43. Their Honours found that neither the decision of the senior medical officer nor the decision of the delegate of the Minister to refer the case to the Medical Services Committee of Inquiry satisfied the test established by the *ABT Case* as to what constituted a reviewable decision.

44. Justice Davies, who concurred in the orders made by Justices Northrop and Lockhart, agreed that the senior medical officer had not made a decision. He also agreed that the delegate of the Minister had not made a decision but considered that he had engaged in conduct for the purpose of the making (by the Minister) of a decision under section 106 of the Health Insurance Act. Thus, in the view of Justice Davies, the action of the delegate of the Minister in referring the case to the Committee was reviewable under section 6 of the ADJR Act. He concluded, however, that Dr Edelsten had not established any grounds upon which an order of review might be granted.

45. The effect of the view taken by Justices Northrop and Lockhart in this case of the principle in the *ABT Case* is that many investigative-type decisions will not be decisions that attract an entitlement to reasons. The same result flows from the approach taken by Justice Davies, since the right to reasons is not attracted when conduct, as opposed to a decision, is in issue. The Council should say, however, that, in the light of the interpretation of conduct adopted by Chief Justice Mason in the *ABT Case*, some doubt exists whether the action of the delegate of the Minister in the *Edelsten Case* is properly to be regarded as conduct.

46. The analysis in the *Edelsten Case* suggests that there will be areas apart from the area of investigations where the question will arise whether the 'decision' concerned is merely a 'stepping-stone' and not an operative and determinative decision such as to attract the ADJR Act. At least for the time being, therefore, the *ABT Case* would appear to have introduced a degree of uncertainty into the section 13 processes. The Council will keep this matter under review and will take the matter up with the Attorney-General should it appear to it that any legislative change is required.

Decisions to which s.28 of AAT Act applies

47. As mentioned above, a person who is entitled to seek review of a decision under the AAT Act is also entitled to obtain reasons for the decision under section 28 of that Act. Certain decisions may be potentially reviewable under both the AAT Act and the ADJR Act. In such a case, to avoid duplication of the provision of reasons, the person is limited to making an application under the AAT Act (s.13(11)(a)).

48. Some potential for injustice arises out of the relationship between section 13 of the ADJR Act and section 28 of the AAT Act. The exclusion in paragraph 13(11)(a) of the ADJR Act is not in terms of a person who has been provided with reasons under the AAT Act but is in terms of a decision in relation to which section 28 of the AAT Act applies. It could happen, therefore, that a person is refused a statement of reasons under section 13 of the ADJR Act on the ground that the decision is one to which section 28 of the AAT Act applies but is also refused a statement of reasons under section 28 of the AAT Act because the 28 day

time limit for requesting reasons has by then expired. How often this has happened in practice is difficult to say. The statistics provided to the Council do not reveal how many requests for statements of reasons have been refused under paragraph 13(11)(a).

49. In fact, in cases where the particular request for reasons relates to a decision to which section 28 of the AAT Act applies, one would expect administrators not to respond by saying to the applicant that the request should have been made under that section. Instead they should treat the request as having been made under that section and should furnish reasons accordingly to treat the request in this way would be consistent with the decision of the Federal Court in *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500. In that case (at p. 508) the Federal Court expressed the view that a request for reasons does not need to recite the particular Act under which it is made.

50. Nonetheless, the Council considers that a minor amendment of section 13 is desirable to address the potential difficulty. This view is shared by the ACT Law Society, the Administrative Law Section of the Law Institute of Victoria, Mr L J Curtis and the Attorney-General's Department. The most appropriate course would appear to be to repeal paragraph 13(11)(a) and to amend paragraph 13(11)(b) so that it reads:

> (b) a decision in respect of which a statement has been furnished setting out findings of facts, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

51. Such an amendment would have the effect that a person could only be turned away under section 13 where the person was already in possession of a statement of reasons that met the standard of the section (or where the decision concerned fell within one of the excluded classes). The amendment would have the incidental effect of rendering unnecessary provisions such as subsection 26(lA) of the FOI Act and subsection 40(6) of the *Archives Act 1983*. Those subsections presently exclude the operation of section 13 of the ADJR Act from decisions refusing to grant access to documents. Section 13 is excluded because the FOI Act and the Archives Act themselves require those decisions to be accompanied by a full reasons statement.

Recommendation 1: Decisions to which section 13 applies

(1) Paragraph 13(11)(a) ought to be repealed.

(2) Paragraph 13(11)(b) ought to be amended along the following lines:

> **(b) a decision in respect of which a statement has been furnished setting out findings of facts, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.**

(3) Subsection 26(lA) of the *Freedom of Information Act 198*2 and subsection 40(6) of the *Archives Act 1983* ought to be repealed.

Schedule 2 decisions

52. Schedule 2 is set out in Appendix D. Classes of decision set out in it presently fall within the ambit of judicial review under the Act but remain outside the scope of the reasons requirement. The Schedule 2 exclusions are discussed in detail in chapter 5.

Form of request

53. Section 13 does not require a request to be made in a particular way. Subsection 13(1) requires merely that the request be made 'by notice in writing given to the person who made the decision'. No fee is involved. In *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500, 508 Justice Woodward said:

> It is to be noted that no form of request is prescribed. Nor does the section require that the request be stated as being made pursuant to the Judicial Review Act. Persons making decisions to which that Act applies must be taken to know of their obligation to supply reasons when requested to do so. They should not need to be referred to the relevant legislation. Nor should a person with rights under the Judicial Review Act be denied those rights merely because he does not know of them, or only knows of them vaguely, and so makes a request in some informal letter or other communication which does not follow the wording of s.13(1).

54. The principles of good administration would suggest that it is better for decision makers to respond sympathetically to an informal request for reasons and not to argue that a proper request has not been made. As will be seen from the statistics set out in table 1 of chapter 4, the number of requests for statements of reasons that are refused because the requests are not in proper form tend to be very small both in absolute terms and as a percentage of total applications. The 1988 figures showing 32 refusals on this ground appear to be a statistical aberration. It would be a matter for concern if the statistics revealed numerous cases where requests were refused on the ground that they were not in proper form.

55. Section 17 provides for cases where the original decision maker no longer holds the office he or she was in when the decision was made.

56. Subsection 3(6) has the effect that notice of the request may be given to the decision maker by ordinary post.

Time limits

57. A request under section 13 for a statement of reasons must be made within 28 days of the date of the decision if it is one that has been recorded in writing and set out in a document furnished to the person who made the request. In other cases, the request must be made within a reasonable time after the decision was made (s.13(5)). A person may apply to the Federal Court to declare that a request for reasons was made within a reasonable time after the decision was made (s.13(6)). A decision maker is required to comply with the request within 28 days of its receipt (s.13(2)). A person who has been furnished with a statement in response to a request may apply to the Federal Court for an order for an additional statement or additional statements containing further and better particulars in a case where the original statement is inadequate (s.13(7)). If, however, litigation is contemplated and it is unlikely that a comprehensive statement of reasons will resolve the issue, applicants may consider it to be to their advantage not to seek further and better particulars where the original statement is inadequate, as that statement may provide a useful basis from the applicant's point of view for the foundation of a judicial review application (but see the discussion of *Faulkner v Conwell*, below).

58. In the context of litigation, it may also be noted that section 13 can be used to 'buy time'. If a person requests a statement of reasons for a decision, the 28-day time limit in section 13 for bringing a judicial review application does not commence to run until the day on which the statement is furnished.

Stay of decision

59. On the other hand, the Federal Court will not grant a stay of a decision under section 15 merely because a statement of reasons for the decision has not been given: *Gonaseelan v Minister for Immigration and Ethnic Affairs* (1985) 7 ALN N168-9. The Federal

Court has, in several cases, given consideration to the appropriate tests to be applied where a stay of a decision is sought. In *Castlemaine Tooheys Ltd v South Australia* (1986) 67 ALR 553 Acting Chief Justice Mason of the High Court said that, at least in the majority of cases, the proper approach in considering whether an interlocutory injunction should be granted is first to inquire whether there is a serious question to be tried and then to determine the matter on the balance of convenience.

60. Several submissions on the Council's discussion paper addressed the question whether the absence of a statement of reasons should itself provide grounds for an order for a stay of the decision. The Administrative Law Section of the Law Institute of Victoria, the Law Society of the ACT and the Public Interest Advocacy Centre all argued that the Act should be amended to enable a stay of the decision to be obtained until such time as reasons were provided. The Attorney-General's Department also tended to support an appropriate amendment. The Public Interest Advocacy Centre suggested that the Federal Court should be required to grant the stay until 7 days after the reasons were furnished, unless the respondent showed that it would not be just to do so.

61. The New South Wales Law Society, the Law Society of Western Australia, the Australian Customs Service, the Department of Transport and Communications and Mr L.J Curtis favoured no change to the present law. Some of them expressed the view that the significance of the non-provision of a statement of reasons should continue to be one of the matters weighing in the exercise of the Court's discretion under section 15.

62. It is true that the Federal Court has not said that an absence of reasons is irrelevant to the grant of interlocutory relief. *Gonaseelan's Case* merely indicates that the non-provision of reasons, standing alone, will not found such relief. On the other hand, the provision of statements of reasons is an essential element of the judicial review process. It can be argued that, since one of the main purposes of the entitlement to a statement of reasons is to enable the person whose interests are affected by the decision to form a view as to its legal validity, the decision should not be given effect to at least until after the statement is provided. It can further be argued that one of the material matters ordinarily militating against the grant of a stay, namely, that the respondent may be prejudiced by the order, is not relevant in these circumstances as the Act requires the statement of reasons to be provided within 28 days.

63. The Council considers that the most appropriate course would be to seek an amendment of section 15 which drew attention to the non-provision of a statement of reasons as a factor to be weighed by the Federal Court in the balance of convenience when determining whether a stay should be granted. The submission of Mr J Doyle, QC, Solicitor-General of South Australia, would seem broadly to support this approach, as would several other submissions.

Recommendation 2: Interlocutory relief
Section 15 ought to be amended to provide that, without limiting the discretion of the Federal Court under subsection 15(1), a matter to which the Court may have regard in determining whether or not to grant relief under paragraph 15(1)(a) or (b) is whether the person who made application to the Court under section 5 has been given a statement under section 13 in respect of the decision concerned.

Failure to provide statement
64. Section 13 does not deal with the situation where, without giving a notice under subsection 13(3) or without invoking subsection 13(4A), a decision maker simply fails to

supply a statement of reasons in response to a request. From time to time the Council has heard it said by legal practitioners that these circumstances occur, although it does not appear to be a frequent problem. More common is the failure by decision makers to comply with the 28 day time limit for providing a statement of reasons.

65. If a decision maker fails to supply a statement of reasons when requested to do so, a possible avenue for the person who made the request would be to seek an order of review under section 7 in relation to the failure of the decision maker to act. *Lloyd v Costigan* (1985) 62 ALR 284, 293 suggests that the Federal Court has power to order reasons to be given, certainly once proceedings have commenced to review a decision. Alternatively, an applicant could use section 39B of the Judiciary Act to seek an order of mandamus to command the furnishing of reasons: *Clanwilliam Pty Ltd v Bartlett* (1984) 6 ALN N61.

66. It will, of course, be expensive to activate the judicial review procedure under the ADJR Act or under section 39B for the purpose of obtaining a statement of reasons. Furthermore, it would seem to be contrary to one of the major reasons for imposing the reasons requirement if a person were to be required to commence judicial review proceedings for the purpose of determining whether he or she has grounds for commencing separate proceedings. A simpler means of obtaining the production of a statement of reasons would seem to be required. The discussion paper suggested that a possible solution might be to insert in section 13 a provision which drew attention to the availability of the Ombudsman to investigate a complaint about a failure to provide a statement of reasons. Several submissions supported this approach. On the other hand, some submissions made the point that it was difficult to see why it was more important that a person should be made aware of the right to complain to the Ombudsman in a matter of this kind than in a matter where a substantive right was in issue, eg, a right to a pension.

67. The Council accepts the force of this point. The better approach would appear to be to deal with the matter directly by giving the Federal Court power to order the furnishing of a statement of reasons under the section. An amendment of section 13 along these lines would also have the effect of ensuring that the 28-day time limit for the provision of statements of reasons was adhered to by administrators more rigorously than at present.

Recommendation 3: Power in Court to order statement of reasons
Section 13 ought to be amended to provide that, on the application of a person who has made a request under subsection 13(1), being an application made not earlier than 28 days after the making of the request, the Federal Court may make an order directing the giving to the person of a statement under section 13.

Content of statement of reasons

68. It was mentioned above that, in response to a request for a statement of reasons, the decision maker must provide 'a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision'. This formulation has been criticised from time to time by administrators as difficult to understand. In response to this criticism, the Council, in November 1978, produced its Explanatory Memorandum referred to in chapter 1, which attempted to explain what section 13 required in relation to the content of a statement of reasons. It is true to say that the Explanatory Memorandum itself attracted some criticism as being difficult to understand, particularly by those who do not have legal qualifications.

69. The Council acknowledges the force of this criticism but for several reasons it is not minded to attempt to revise that memorandum. In the first place, having regard to the diversity of decision making circumstances that arise across the breadth of Commonwealth administration, it is difficult to lay down guidelines that will be adequate for even a large proportion of decisions (Income Tax Ruling MT2037 of the Commissioner of Taxation acknowledges this, at para 37). Secondly, it seems to the Council that the more satisfactory approach is for each agency to tailor guidelines for itself on how statements of reasons should be provided. The Council would be happy to assist agencies in this regard but the training of staff in the making of decisions is better done by agencies themselves.

70. The essential matter to be borne in mind in the preparation of a statement of reasons is that the statement must be seen as part of the decision making process. In preparing a statement of reasons, the decision maker needs to set out all the findings relevant to the making of the decision. He or she must then set out the steps of reasoning linking the facts to the decision.

71. Some general guidance on the process has been provided by the Federal Court. In *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500, 507 Justice Woodward said:

> . . . the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.

72. The part of this passage suggesting that decision makers should set out their understanding of the relevant law was to some extent qualified by Justice Lockhart in *Ansett Transport Industries (Operations) Ltd v Secretary, Department of Aviation* (1987) 73 ALR 193. Justice Lockhart said that, in some cases, having regard to the nature of the circumstances, in particular the familiarity of the party seeking reasons with the legislative framework, a brief reference to the statutory law may be sufficient. He said that Justice Woodward's dictum did not support a proposition that in every case a decision maker must, in substance, specify all relevant law or give a legal opinion as if he were a barrister advising his client (p. 198).

73. In other cases the Federal Court has warned that section 13 should not be viewed by a decision maker as a threat to be evaded by a 'camouflage of obscurity'. The Court has also said that a statement of reasons ought not to be construed as a legal document:

> It would be wrong for courts to construe reasons in an overly critical spirit, forgetful that they are the reasons of an administrator, not of the draftsman of an Act. (*ARM Constructions Pty Ltd v Deputy Commissioner of Taxation* (1986) 65 ALR 343, 349).

74. This view was taken up in *Bowring v Minister for Immigration* (1987) 13 ALD 677, 679 where the full court of the Federal Court cautioned against too fine an analysis of statements of reasons:

> They should not be examined as an Act of Parliament, or a contract drawn by solicitors, with time for review and evaluation, would be examined. They should be studied carefully but sensibly, and not zealously in pursuit of error.

75. If a valid request for a statement of reasons is made and the statement provided by the decision maker is insufficient to meet the requirements of subsection 13(1), there is authority for the proposition that the 28 day period for lodging an application for review of the decision does not commence to run until such time as a sufficient statement of reasons is given: *Herlihy v Minister for Foreign Affairs*, 16 November 1984, unreported.

76. The statement must be sufficiently explicit to enable the recipient to determine whether the making of the decision was an improper exercise of the power conferred by the enactment, the decision involved an error of law, the decision maker took into account an irrelevant consideration or failed to take into account a relevant consideration and like matters referred to in sections 5 and 6 of the Act: *Hatfield v Health Insurance Commission* (1987) 77 ALR 103, 105-6. A statement will be deficient if it states conclusions without particulars or explanations for those conclusions: *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (No. l) (1987) 77 ALR 577, 594-6.

77. A statement may state a finding by reference to some other document (for example a summary of the facts in an earlier report) but it must explain to the reader the reasons why the particular decision was taken: *Maitan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 307. Where recommendations are considered in making a decision the statement should incorporate those recommendations: *Palmer and Minister for the Capital Territory* (1978) 1 ALD 183.

78. The statutory obligation in this respect is on the decision maker personally. It is up to decision makers themselves to formulate in their statements the conclusions they reached on material questions of fact and the reasons for their decisions. It is not appropriate for a submission of a Departmental officer made to the decision maker before the decision maker has made the decision concerned to purport to set out findings on material questions of fact at a time before the decision is made. It is for the decision maker not the Departmental officer to set out the findings on which the decision is based. The submission should be in the form of recommendations to the decision maker and should include a summary of factual material which the person making the recommendation considers relevant to the making of the decision by the decision maker. Items in this material can then be accepted by the decision maker as relevant to his or her decision or can be rejected: *Palko v Minister for Immigration and Ethnic Affairs* (1987) 12 ALD 480; *Maitan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 307.

79. Although it may be convenient in the departmental context for the pre-decisional submission to be in a form which can simply be 'adopted' by the decision maker should a request for a statement of reasons be received, there are, as the Federal Court said in the *Palko Case*, 'obvious difficulties in drafting a document intended to fulfil that function before the decision has been made'.

Findings of fact

80. Findings on all questions of fact are not required. It is sufficient if the statement sets out findings on material questions of fact. That is, the decision maker must set out such findings of fact as addressed the material issues and were taken into account in making the decision. If a statement of reasons does not set out findings of fact on a matter, the Federal Court may infer that those facts were considered immaterial: *Sullivan v Department of Transport* (1978) 20 ALR 323, 348-9.

Reference to evidence or other material

81. The evidence or other material upon which the findings on material questions of fact are based must be referred to in the ,statement; it is not necessary for it to be set out in full: *Ansett Transport Industries (Operations) Pty Ltd v Secretary, Department of Aviation* (1987) 73 ALR 193. The evidence may be identified by stating its source or nature, whichever is the more intelligible and informative. A purported list of all the documents that were before the decision maker will not normally be regarded as satisfying the requirement that there be in the statement a reference to the evidence or other material on which any finding was based: *ARM Constructions Pty Ltd v Deputy Commissioner of Taxation* (1986) 65 ALR 343, 349.

Reasons for the decision

82. A statement of reasons should contain all the steps of reasoning linking the facts to the ultimate decision which are necessary for a person affected to understand how the decision was reached. The factors taken into account and the importance given to those factors should be stated: *Salazar-Arbelaez and Minister for Immigration and Ethnic Affairs* (1977) 18 ALR 36.

Content of statement-scope for simplification?

83. In the Council's discussion paper the question was raised whether the formulation in subsection 13(1) could be or ought to be simplified in some way. In no submissions made to the Council was any enthusiasm expressed for a change. Indeed, of course, the difficulty is that the subsection sets out what the reasoning process should be, namely, ascertainment of relevant facts and the process of linking the facts to the ultimate decision. If one accepts that decision making must not be arbitrary but must proceed on a rational basis, the scope for any departure from the present language of subsection 13(1) would appear to be quite limited. The Committee of the JUSTICE - All Souls Review of Administrative Law in the United Kingdom, after a thorough survey in the United Kingdom and elsewhere of the duty to give reasons, concluded in its 1988 report, *Administrative Justice: Some Necessary Reforms*, that the formula used in that subsection was the appropriate formula to be used in the legislation which it proposed for the United Kingdom to introduce a general duty to give reasons.

84. It should be noted that the formulation in subsection 13(1) has also been adopted in New South Wales. The *Health Legislation (Reasons for Decisions) Amendment Act 1987* amended various New South Wales health statutes to require the giving of reasons for decision by various medical registration and other boards. In each case, the written statement of decision is required to set out findings on material questions of fact, to refer to any evidence or other material on which the findings were based and to give the reasons for the decision.

Admissibility and evidentiary value of reasons statements

85. The decision of the full court of the Federal Court in *Minister for Immigration, Local Government & Ethnic Affairs v Taveli* (1990) 94 ALR 177 contains an important discussion about the admissibility of a statement of reasons for decision in proceedings in which judicial review of the decision is sought. Before the decision in *Taveli's Case*, issues concerning the admissibility of statements of reasons in judicial review proceedings, and the evidentiary value to be accorded to them in those proceedings, had been considered by the Federal Court in three cases.

86. In *Sezdirmezoglu v Acting Minister for Immigration and Ethnic Affairs* (1983) 51 ALR 561 the Minister's statement, unsupported by any affidavit, was tendered at the commencement of the hearing. The report of the case does not show whether the tender was by the applicant or the respondent. Justice Smithers said that, unless the statement of the Minister was effectively challenged, it was 'evidence of the reasons for his decision' (p. 570).

87. Whether a statement of reasons may be treated as evidence of the facts which lay behind the particular decision was considered by the full court of the Federal Court in *Minister for Immigration and Ethnic Affairs v Arslan* (1984) 55 ALR 361. The statement of reasons in issue in that case related to a decision refusing to extend temporary entry permits. The statement did not refer to a departmental report which contained allegations against the

respondents to the appeal. At the hearing counsel for the Minister had objected to the tender of the report on the ground that it had not been referred to in the section 13 statement. The objection had not been allowed by the trial judge. On the appeal, counsel for the Minister argued that the trial judge should have rejected the tender because, the report not having been referred to in the section 13 statement, the trial judge should have inferred that the decision maker had not taken it into account.

88. Although the full court allowed the appeal on other grounds, it did not accept this argument. It said that, while the applicant for review of the decision could extract from the statement of reasons, and use, such statements as were admissions in his favour, the decision maker could not use the statement of reasons as evidence of the facts that underlay the decision in a self-serving way.

89. The full court suggested that its conclusion was not inconsistent with what Justice Smithers had said in *Sezdirmezoglu*. It drew a distinction between the statement of reasons as evidence of the reasons of the decision maker and the statement as evidence of the facts contained in it.

90. It follows from the fact that the statement of reasons is not to be regarded as providing conclusive proof of the basis for the decision that the decision maker may lead before the Court additional material to supplement the statement of reasons. This was established by the decision of the full court of the Federal Court in *Faulkner v Conwell* (1989) 17 ALD 456.

91. In that case, the statement of reasons which had been supplied to the taxpayer prior to his seeking judicial review of the Commissioner of Taxation's decision refusing to grant an extension of time to pay tax was inadequate. Justice Woodward in the appeal to the full court described it as 'quite unsatisfactory' (p. 456). At first instance, affidavit evidence had been admitted indicating that the taxpayer had failed to comply with requests to supply particular information concerning his financial affairs. These requests had been made before the statement of reasons was prepared, but were not referred to in that statement.

92. The taxpayer's application for judicial review was dismissed at first instance. One of the grounds of appeal to the full court was that evidence of the requests for information had been wrongly admitted. The taxpayer argued (contrary it would seem to the view expressed in *Arslan*) that, where a statement of reasons is furnished by the decision maker, the Court is bound to treat the statement as conclusively establishing the evidence on which the findings of fact were made and what the reasons for the decision were.

93. The full court disagreed. It said that there was no sufficient indication in the ADJR Act of a legislative intention to deny the Court a means of ascertaining facts which is ordinarily available to it. Although section 13 and subsection 11(3) disclosed a policy that a decision should be explained by the decision maker on request so that a person aggrieved might have an opportunity of deciding, before making an application for review, whether the decision disclosed a ground on which an order of review might be sought, the policy was not intended to override established curial modes of ascertaining what the reasons for a decision were. The omission of matter from a section 13 statement was a circumstance from which inferences relevant to the determination of an application for an order of review might be drawn but its omission could be supplied by evidence at the hearing.

94. In *Taveli's Case* one of the issues before the full court of the Federal Court was whether Justice Wilcox in judicial review proceedings at first instance had been correct in rejecting a tender by the decision maker of a section 13 statement which had not been verified by affidavit. The decision maker wished to tender the statement to show that allegations adverse to the applicant contained in a departmental report had not been taken into account by the decision maker in making his decision. In the circumstances, the section 13 statement was clearly a self serving document.

95. Justices Davies and Hill agreed that Justice Wilcox was correct in rejecting the tender of the section 13 statement. They would have concluded otherwise if it had been verified by affidavit. Justice French said that the section 13 statement should not have been rejected but concluded that, even if it had been accepted, it would not have affected the conclusion that there had been a failure to accord the applicants procedural fairness.

96. Both Justices Davies and Hill were of the view that, while order 54 rule 3 of the Federal Court Rules provides for the filing by an applicant for review of any statement of reasons given by the, decision maker, that rule was not a rule directed to the admissibility of evidence. Justice Davies drew attention to order 54 rule 8 which permits an affidavit to be used setting out the deponent's findings and reasons without requiring his or her attendance for cross examination. His Honour considered that the dispensing power in that rule sufficiently dealt with the concerns which had been put to the Court that Ministers and heads of departments should not be placed in the position whereby, if they wished to support their decisions, they needed to swear an affidavit, thus rendering themselves liable to cross-examination. He commented ((1990) 94 ALR 177, 180) that, prior to the introduction of the rule, it was common practice for counsel for respondent decision makers to cross examine applicants and their witnesses on matters which, if relevant at all, were peripheral to the issues to be resolved. At the same time, he said, it was common for counsel for applicants to insist upon the attendance for cross examination of busy decision makers and to cross examine at length with a view to demonstrating errors in the reasons stated.

97. His Honour considered that judicial review proceedings could frequently be better dealt with on the papers, that is to say, having regard to the relevant legislation, to the material that was or ought to have been before the decision maker and to the reasons for decision stated in writing by the decision maker. He observed that, in the United Kingdom, the practice is for cross examination of deponents not to be permitted without leave and for leave to be granted frugally.

98. Justice Hill, while agreeing generally with Justice Davies, said (at p. 204) that he could not accept all that Justice Davies had said concerning the undesirability of decision makers being subject to cross examination. He said that whether the dispensing power provided for under order 54 rule 8 would be exercised would depend upon all the circumstances of the case and, in particular, upon the issues which were raised between the parties. He thought that the grant of leave to cross examine would sometimes be desirable having regard to the fact that 'a s.13 statement is often prepared at a time somewhat distant from the actual decision, at a time when the possibility of litigation will be obvious and often with the assistance of legal advisers attuned to the issues which are likely to arise' (p. 205).

99. On the question of the desirability of allowing cross examination, the views of Justice French were similar to those of Justice Hill. Justice French said that the statement of reasons can be treated as evidence of the fact that the reasons for decision and the findings on which they are based were as set out in the statement. However, it was merely a piece of

evidence to be weighed and assessed like any other. It was not to be taken as purporting to assert conclusively the facts on which the decision was made. His Honour considered that, in a proper case, where the issue of the construction, correctness or completeness of the statement was properly raised on good grounds, the Court could permit cross examination of the decision maker.

100. In *Taveli's Case*, although Justices Davies and Hill considered that the tender of the section 13 statement was correctly rejected on the basis that it was an unverified and self serving statement, both indicated that, if it had been provided as part of the record of the challenged decision, it would be part of the *res gestae* and therefore admissible.

101. The doctrine of *res gestae* is an inclusionary principle of the law of evidence. It means that a particular item may be received into evidence because of its contemporaneity with the act in issue. Under the *res gestae* doctrine, evidence may be received even if, were it not part of the *res gestae*; it would infringe the exclusionary rule of evidence that self serving statements are not admissible.

102. As was noted above, Justice Hill in *Taveli's Case* made particular mention of the fact that section 13 statements are prepared subsequent to the making of the decision. This factor was of some significance to the view which he expressed that cross examination on the statement of reasons would sometimes be appropriate.

103. On the basis of the present state of the law, the following propositions would appear to apply:

- a section 13 statement that is not verified by affidavit may be tendered by the decision maker with the consent of the applicant;
- if the applicant does not consent, an unverified section 13 statement will be ruled inadmissible;
- the applicant may tender a section 13 statement that has been furnished to him or her and may rely on material in the statement, including material that is an admission against the decision maker.

104. It is open to question whether this position is appropriate so far as the tender of section 13 statements by decision makers is concerned. The Council considers that a statement of reasons prepared by an officer pursuant to a statutory obligation is in a special category and should not be regarded as falling within the exclusionary rule which excludes from evidence self serving out of court statements by witnesses. In this regard, the Council agrees with the views expressed by Justice French in *Taveli's Case*.

105. On the other hand, it is sometimes apparent that a particular statement of reasons has been crafted more as an ex post facto justification of the decision than as a statement of the actual reasoning process of the decision maker in reaching his decision. Perhaps it is inevitable that, where litigation appears likely, the decision maker will seek the advice of the legal area in the agency concerned, or other legal advice, so as to ensure that the statement of reasons is as legally watertight as possible. But it would be a cause for concern if the principal aim of the exercise were seen to be the crafting of a statement .that will stand up in court.

106. The Council considers that the ADJR Act ought to be amended to make more satisfactory provision for the tender by the decision maker of a statement of reasons in judicial review proceedings challenging the decision to which the statement relates. In the

Council's view, the amendment should provide, first, that the section 13 statement, when tendered by the decision maker, is admissible as evidence of the reasons of the decision maker if the decision maker has given the applicant prior notice of intention to tender the statement as evidence of the reasons for decision and the applicant has not objected to the tender. Secondly, the amendment should provide that, if the applicant objects to the tender, the Federal Court may give leave to admit the statement into evidence without attendance by the decision maker for examination; the discretion of the Federal Court to be exercised taking into account:

- the nature of the grounds of review upon which the applicant relies; and
- the desirability of the decision maker verifying the reasons for decision having regard to all the circumstances of the case.

107. The third element of the proposed amendment should be that, if the Federal Court refuses to give leave, the decision maker is required to verify the statement by affidavit and to be available for cross-examination on the statement. Finally, the amendment should provide that the weight to be accorded to the statement once it is tendered is a matter for the Federal Court.

108. The proposed amendment set out above would not affect tender of a section 13 statement by the applicant. In accordance with the principle of *Arslan's Case*, the applicant would be entitled to extract from the statement and to rely upon statements contained within it that are admissions in the applicant's favour.

109. The proposed amendment would be consistent with the recommendations of the Law Reform Commission in Report No. 38, *Evidence*, dealing with exceptions to the general rule of exclusion for hearsay evidence.

110. An aspect of the *Taveli* decision, which may be of particular importance to administrators, is the view expressed by Justices Davies and Hill that, if the statement of reasons were to accompany the decision concerned, it would be admissible as part of the *res gestae*. This suggests that, particularly on occasions when the decision maker considered that a challenge to the decision in the Federal Court was likely, there would be a distinct advantage for the decision maker in providing the statement of reasons contemporaneously with notification of the decision. Provision by decision makers of a statement of reasons at this point, rather than ex post facto, would ensure that they would not be liable to be required to attend for cross examination.

Recommendation 4: Tender by decision makers of section 13 statements in judicial review proceedings
The ADJR Act ought to be amended along the following lines:

- **when a copy of a statement furnished under section 13 in relation to a decision is tendered by the decision maker in proceedings under the Act for an order of review in respect of the decision, the copy is admissible as evidence of the reasons for the decision if**
  - **(a) the decision maker has given the applicant prior notice of intention to tender the statement as evidence of those reasons; and**
  - **(b) the applicant does not object to the tender;**
- **if the applicant objects to the tender, the Federal Court may, at its discretion, give leave to admit the statement into evidence without attendance by the decision maker for examination;**
- **in exercising its discretion, the Federal Court must take into account:**

(a) the nature of the grounds of review upon which the applicant relies; and
(b) the desirability, in all the circumstances of the case, of the decision maker verifying by affidavit the reasons for the decision;

- **if the Federal Court refuses to give leave but the decision maker still wishes to tender the statement, the decision maker must verify the statement by affidavit and must be available for cross examination on the statement;**
- **the weight to be accorded to a statement of reasons tendered by the decision maker is a matter for the Federal Court.**

Translations for non-English speakers

111. In its Report No. 27, *Access to Administrative Review, Stage 1, Notification of Decisions and Rights of Review*, the Council dealt with the problem of the provision of information about rights of review to those whose first language is not English. The Council recommended in that report a code of practice for notification of decisions and rights of review. So far as reasons for decisions are concerned, the code of practice suggests that persons whose interests are affected by decisions reviewable on their merits should be given written notification of the decisions, that the notification should include information about any statutory right that a person may have to request reasons for the decisions and that, where the agency concerned suspects that the person would have difficulty in reading English, the notice should incorporate advice in that person's first language of means by which that person might have the notice interpreted in his or her first language.

112. It was suggested in the Council's discussion paper that the intent of the Council's recommendations in Report No 27 ought to be followed in relation to the giving of reasons under section 13 of the ADJR Act. The Human Rights and Equal Opportunity Commission in its submission expressed support for this approach, as did the Law Society of New South Wales, the Victorian Bar Council, the Legal Aid Commission of New South Wales, the Australian Customs Service, the Department of the Prime Minister and Cabinet and the Administrative Law Section of the Law Institute of Victoria. The Human Rights and Equal Opportunity Commission said that it was reasonable and appropriate to require agencies to include with the statement of reasons a notice in the person's first language advising where the person might have the statement translated. The Department of the Prime Minister and Cabinet said that the inclusion of a covering sheet with a statement of reasons providing information in all the major community languages about translation facilities would be a relatively inexpensive approach to the problem.

113. Mr L J Curtis in his submission made the point that the more important issue was to ensure that persons whose first language was not English had access to facilities for translation of the decision itself and of their rights to have it reviewed.

114. The Council agrees with the point made by Mr Curtis. However, it also considers that, where the agency concerned suspects that the first language of the person concerned may not be English and that the person may have difficulty in reading English, a sheet should be included with the statement of reasons giving information in the major community languages about where translation facilities may be found.

Recommendation 5: Advice of translation facilities
If an agency to whom a request for a statement of reasons is made suspects that the first language of the person making the request is not English and that the person may have difficulty in reading English, the agency ought to include with the statement of reasons

information in the major community languages about where translation facilities may be found.

Protection of sensitive information

115. Sections 13A and 14 provide means of protecting confidential and sensitive information that would otherwise have to be included in a statement of reasons. Those provisions are considered in the next chapter.

CHAPTER 3

PROTECTION OF CERTAIN INFORMATION FROM DISCLOSURE

Section 13A

116. Section 13A of the ADJR Act absolves decision makers from including in a statement of reasons information relating to the personal or business affairs of a person (other than the person requesting reasons):

- that was supplied in confidence;
- the publication of which would reveal a trade secret;
- that was supplied in compliance with a duty imposed by an enactment; or
- the furnishing of which would be in contravention of a secrecy provision in another Act.

117. If the statement would be false or misleading if it did not include such information, the decision maker is not required by section 13 to furnish the statement (s.13A(2)(b)). Notice of the exclusion of information from a statement or of the non-provision of a statement, together with reasons in each case, is to be given to the person seeking the statement (s.13A(3)).

118. Section 13A was inserted in the Act in 1980, at the same time as schedules 1 and 2 were inserted. In his second reading speech, the then Attorney-General, Senator Durack said that there was a real danger that the obligation to give reasons as contained in the Act might lead to the disclosure of confidential information of a personal or business kind and there was a real concern that legislation primarily directed to the accountability of government should not be allowed to become a conduit for information of this kind.

119. If one of the purposes of section 13 is to enable a person adversely affected by a decision to see whether there are grounds upon which the decision might be challenged, the logical position would be that relevant information that could be put before the Federal Court in judicial review proceedings should not be excluded from the statement of reasons. However, difficult questions of law may be involved in determining whether information of certain kinds should be disclosed in such proceedings. It is not reasonable to put administrators in the position where they are required to make these judgments in their administration of section 13. Accordingly, it is appropriate that the ADJR Act itself frame suitable tests for ensuring that the affording of administrative justice to one person, through the provision of a statement of reasons for a decision affecting his or her interests, is not at the expense of the personal privacy or the legitimate business interests of another person.

120. Section 13A gives effect to this approach. Any proposal for alteration of the section needs to be considered bearing the purpose of the section in mind.

Personal information

121. In so far as section 13A deals with information relating to the personal affairs of a person, it should be noted that the section was enacted before the *Privacy Act 1988* came into force. That Act makes provision for the protection of the privacy of individuals. Information

Privacy Principle 11 imposes certain limitations on the disclosure of personal information by agencies that are in possession or control of records of personal information. 'Personal information' is defined in section 6 as 'information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'. That definition is broader than the expression information relating to the personal affairs of a person as used in section 13A of the ADJR Act. An individual's name alone would appear to come within the definition of 'personal information' for the purposes of the Privacy Act. The same may not be able to be said for the expression in section 13A. The Australian Customs Service in its submission drew attention to the disparity between the language of section 13A and that of the Privacy Act. It suggested, as did the Attorney-General's Department, that section 13A now ought to be reconsidered in the light of the Privacy Act.

122. To the extent that section 13A provides a mechanism for exempting from disclosure in a statement of reasons information relating to the privacy of individuals, the Council agrees that the matter ought to be governed by the Privacy Act and that section 13A ought to contain a suitable reference to the limits on disclosure imposed by that Act. Such an amendment would have the effect that personal information and information relating to business affairs would be separately dealt with under the section. Subsection 13A(3) would continue to require the giving of a notice where personal information was not disclosed as a result of application of the Information Privacy Principles of the Privacy Act.

Recommendation 6: Personal privacy
Section 13A ought to be amended to provide that the section applies in relation to any information to which a request under subsection 13(1) relates, being information which is personal information within the meaning of the *Privacy Act 1988* and which that Act prevents the person to whom the request was made from disclosing.

Business affairs information supplied in confidence

123. The effect of recommendation 6 will be to confine the matters presently set out in paragraph (b) of subsection 13A(1) to information relating to the business affairs of a person. As to those matters, the Council, in Report No 9, *Administrative Decisions (Judicial Review) Amendment Bill 1980* (unpublished report, the text of which appears in Hansard, *Senate*, 20 August 1980, 151-3), recommended that section 13A ought not to apply in circumstances where the information concerned, though once falling within it, has subsequently become publicly available. This recommendation was concerned principally with sub-paragraph (b)(i) dealing with information 'that was supplied in confidence'.

124. The Council's discussion paper suggested that, on the basis of the interpretations that have been given under the FOI Act to the expressions 'breach of confidence' and 'matter communicated in confidence', there was a case for an amendment to be made to subparagraph 13A(1)(b)(i) along the lines recommended by the Council in Report No 9. Under section 45 of the FOI Act a document is an exempt document if its disclosure under the Act would constitute a breach of confidence. In interpreting this provision, the AAT has said that a communication may lose its confidential quality over time (*Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALN N257), and a breach of confidence will not arise if the information conveyed in the document has been widely published (*cf Attorney-General's Department v Cockcroft* (1986) 64 ALR 97). However, where the FOI Act uses the term 'matter communicated in confidence' (ss.33(1)(b), 33A(1) (b)), only the circumstances in

which the matter was communicated will be relevant. If a document contains matter that is communicated in confidence, the fact that the matter may subsequently be made public or may otherwise lose its confidential nature will not necessarily destroy the document's exempt status (*Robinson and Department of Foreign Affairs*, unreported decision, 29 August 1986; *Wang and Department of Employment, Education and Training* (1988) 15 ALD 497, 501).

125. Several submissions on the discussion paper supported the suggestion that subparagraph 13A(1)(b)(i) be amended to refer to information the disclosure of which would constitute a breach of confidence. On the other hand, the submissions of the Attorney-General's Department, the Australian Taxation Office and Mr L J Curtis favoured retention of the present wording of the subparagraph. The Australian Taxation Office referred to the fact that it makes considerable use of business information which has been provided in confidence. The placing in the hands of the administrator of the responsibility for making decisions on whether or not information communicated in confidence had lost its confidential character might, said the Australian Taxation Office, tend to discourage the provision to it of such information.

126. Although the potential difficulty adverted to by the Australian Taxation Office is a difficulty that it must at present have under the FOI Act, the Council accepts that the expeditious provision of statements of reasons might be prejudiced if the decision maker were required to make difficult assessments on whether information retained its confidential character. There does not appear to be a pressing need to introduce this degree of complexity into the task imposed on the decision maker. The different purposes of the FOI Act and of the provisions in the ADJR Act for the giving of statements of reasons for decision also need to be taken into account. The FOI Act gives the public a general right of access to documents. Section 13 of the ADJR Act, on the other hand, is concerned with the giving of reasons for decision to a person who has standing at law to challenge the decision. The essential element is the setting out of the decision maker's findings on material questions of fact. Documentary material on which the findings were based does not have to be set out but is merely referred to. The purpose of section 13 is not to provide a vehicle for access to documentary material but to provide a means of finding out what the decision maker took into account in the reasoning process which led to the ultimate decision.

Time limit

127. The Council considered the terms of section 13A in Report No 9. Amongst the recommendations that the Council made was a recommendation that subsection 13A(3) should contain a 28 day time limit for the giving of a notice informing the person who requested a statement under section 13 of the reason for not including certain information in it or of the reason for not providing the statement, as the case may be.

128. Pearce (*The Australian Administrative Law Service*, p. 1972) has commented that it may be that the 28 day requirements in section 13 govern all provisions relating to the giving of reasons. If so, it may be unnecessary for a 28 day time limit to be written into section 13A governing a notice under subsection 13A(3).

129. On the other hand, it is not clear that the matter is sufficiently covered by the 28 day time limit in section 13. The Council considers it desirable that the matter be put beyond doubt by an express provision that a notice under subsection 13A (3) is required to be given by the decision maker within 28 days of receipt of the request for a statement of reasons. The

Law Societies of New South Wales and the ACT, the Administrative Law Section of the Law Institute of Victoria, the Australian Customs Service and the Attorney-General's Department expressed support for an amendment to clarify the matter.

Recommendation 7: Time limit of 28 days for notice under subsection 13A (3)
Section 13A ought to be amended to require any notice under subsection (3) to be given by the decision maker as soon as practicable, and in any event within 28 days, after the receipt of a request under subsection 13(1) for a statement of reasons for the decision concerned.

Involvement of senior officers

130. In its Report No 9 the Council recommended that, because of their importance, decisions under section 13A not to include information in a statement of reasons, or not to furnish a statement of reasons, should be made or approved only by a Minister, a departmental Secretary or another authorised senior officer. Actual experience with the operation of the section since that recommendation was made shows that few requests for statements of reasons are refused under the section (see the figures in table 1, chapter 4), although there are more cases where, pursuant to the section, information is excluded. Even in this case, the number is relatively small. The Council now considers that, even if the scope of sections 13 and 13A were to be altered as recommended in this report, there is no need to modify section 13A to require senior officers to be involved in any decision to exclude information from statements of reasons or not to provide a statement of reasons.

Reverse FOI procedure

131. As section 13A has the purpose of protecting information relating to personal or business affairs, it might be argued that the section should contain a mechanism similar to the reverse FOI provisions in the FOI Act requiring that a person be informed of the potential release of information relating to him or her and allowing that person to state why the information should not be released.

132. Some of the submissions made to the Council expressed the view that there may be merit in the inclusion within section 13A of such a mechanism. Other submissions expressed opposition to the proposal, mainly on the grounds that it would contribute to delays in making reasons available and that there appeared to be no pressing reason for it.

133. So far as personal information is concerned, the Council considers that the matter ought to be governed by the *Privacy Act 1988* in the manner discussed above. Where information relating to business affairs is concerned, the Council notes that the scope of section 13A is narrower than the scope of section 43 of the FOI Act to which the reverse FOI mechanism applies. Again, this difference reflects the different purposes of the FOI legislation on the one hand and, on the other hand, the scheme under the ADJR Act for the giving of reasons for decisions. The grounds for the reverse FOI mechanism under the FOI Act do not have their equivalent in the ADJR Act. Accordingly, the Council proposes no change to section 13A in this regard.

Appeal rights

134. A decision taken in reliance on section 13A not to provide a statement of reasons or to exclude certain information from it is not at present subject to any right of appeal. If persons

wish to contend, for example, that information was not supplied in confidence or that the information, if disclosed, would not reveal a trade secret, they have no direct mechanism for doing so.

135. Various courses are, however, open. One possibility is that a complaint could be made to the Ombudsman. A further possibility would be to make use of the mechanism in subsection 13(7). It would seem that action taken under section 13A would provide grounds for an application to the Federal Court under that subsection for an order that an additional statement containing further and better particulars be supplied. If, in reliance on section 13A, the decision maker did not provide a statement of reasons at all and if recommendation 3 in this report were implemented, an application could be made to the Federal Court for an order directing the giving of a statement.

Section 14

136. Section 14 provides that a decision maker is exempted from the obligation to provide any information concerning a specified matter in a statement of reasons where the Attorney-General certifies that disclosure of the information would be contrary to the public interest:

- by reason that it would prejudice the security, defence or international relations of Australia;
- by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or
- for any other reason specified in the certificate that could form the basis for a claim in a judicial proceeding that the information should not be disclosed.

137. As with section 13A, if the statement of reasons would be false or misleading if it did not include such information, the decision maker is not required by section 13 to furnish the statement (s.14(2)). Also, notice of the exclusion of information from a statement or of the non-provision of a statement, together with reasons in each case, is to be given to the person seeking the statement (s.14(3)). As with section 13A, the giving of such a notice is not expressed to be subject to a 28 day time limit.

138. Tables 1 and 2 in chapter 4 indicate the few occasions on which a certificate by the Attorney-General under section 14 has been given. This raises the question whether the section is necessary at all. It would appear that the public interest grounds specified in the section do not often have relevance to the giving of reasons for decisions. The Council has concluded, nonetheless, that, having regard to the potential importance of matters that may be covered by a certificate, it is appropriate that the grounds of exemption in section 14 be maintained in the Act.

139. Few submissions on the discussion paper addressed the section. All of those that did considered that it was appropriate for the certification procedure to continue as part of the Act to deal with matters of national or public interest.

140. In the Council's Report No 1, *Administrative Decisions (Judicial Review) Regulations*, the Council stated that the section was unsatisfactory in that no provision was made for review on the merits of the grant of a certificate by the Attorney-General. However, in the light of experience with the section, the Council now considers it unnecessary to introduce a provision for review on the merits.

141. Mr J Doyle, QC, the Solicitor-General for South Australia, suggested in his submission that subsection 14(1) should be amended to make it clear that the subsection applies to information the release of which would involve disclosure of deliberations or decisions of the Cabinet of a State Government. The Council notes that, by virtue of amendments to the Administrative Appeals Tribunal Act made in 1988, section 36B of that Act now provides for the giving of a certificate by a State Attorney-General limiting the disclosure to the AAT under that Act of Cabinet material of that State.

142. However, when these amendments were made, no amendment relating to State Cabinet material was made to section 28 of the AAT Act, which provides for the giving of reasons for decision in respect of decisions that are reviewable under the AAT Act. As a result, material in relation to which a certificate of the Attorney-General under section 28 may be given continues to be described in the same way as the material to which section 14 of the ADJR Act applies. In the light of the fact that amendments of section 28 of the AAT Act were apparently not seen to be necessary at the time when section 36B was inserted in that Act, the Council does not at present see any need for subsection 14(1) of the ADJR Act to be amended to include State Cabinet material within its scope.

143. Consistently with the view taken in relation to section 13A, the Council considers that section 14 should be amended to introduce a time limit for the giving of a notice under subsection 14(3). Given that some time will be involved in obtaining a certificate from the Attorney-General, it is arguable that the time limit should be more than 28 days. On the other hand, the person seeking reasons would be entitled to expect a response within 28 days. On balance, the Council considers it desirable that symmetry be maintained between sections 13, 13A and 14, so far as the giving of a response to the person seeking reasons is concerned. A 28 day time limit under section 14 is, therefore, appropriate.

Recommendation 8: Time limit of 28 days for notice under subsection 14(3)
Section 14 ought to be amended to require any notice under subsection (3) to be given by the decision maker as soon as practicable, and in any event within 28 days, after the receipt of a request under subsection 13 (1) for a statement of reasons for the decision.

Wider Protection from Disclosure of Sensitive Information

144. If the ambit of the ADJR Act is to be extended, as recommended in the Council's Report No 32, *Review of the Administrative Decisions (Judicial Review) Act: the Ambit of the Act*, and if, as this report proposes, the scope of the entitlement to a statement of reasons is more closely aligned with the scope of judicial review under the Act, it is essential that appropriate steps be taken to ensure that sensitive information is protected from disclosure in statements of reasons. Sections 13A and 14 at present offer appropriate protection having regard to the scope of Schedule 2 but, if the obligation to provide a statement of reasons on request is to apply to more classes of decisions than at present, the present scope under the Act for protecting information from disclosure needs to be considered.

145. Information that is particularly relevant in the context of paragraphs (e) and (f) of Schedule 2 is information that would prejudice enforcement of the law or that would endanger the life or physical safety of any person. Such information is specifically exempted from disclosure under the FOI Act (s.37) but is not explicitly provided for in section 13A or 14 of the ADJR Act. The Council considers that section 13A should be amended to provide a basis for its non-disclosure in a statement of reasons. The Council agrees with the Attorney-General's Department which said in its submission that, although information of

the kind dealt with in section 37 of the FOI Act might form the basis for the giving by the Attorney-General of a certificate under paragraph 14(l)(c), it was desirable that the matter be clarified by an appropriate amendment of section 13A, thereby avoiding the need for certification under section 14.

Recommendation 9: Information prejudicing enforcement of the law or protection of public safety

Section 13A ought to be amended to provide that the section applies in relation to any information to which a request under subsection 13(1) relates, being information which would, or could reasonably be expected to:

(a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;

(b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law;

(c) endanger the life or physical safety of any person;

(d) prejudice the fair trial of a person or the impartial adjudication of a particular case;

(e) disclose lawful methods or procedures for preventing, detecting, investigating or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or

(f) prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

146. In Report No 32, the Council recommended the repeal of paragraphs (h) and (j) of Schedule 1. The repeal of those paragraphs would expose to the section 13 requirements decisions under the *Foreign Acquisitions and Takeovers Act 1975* and those decisions under the Banking (Foreign Exchange) Regulations that may presently be exempted from those requirements. The question whether some exemption from the reasons requirement is warranted in respect of information that may be involved in the making of these decisions is considered in chapter 5 in the context of a discussion of those decisions of the Reserve Bank presently referred to in paragraph (1) of Schedule 2. That discussion concludes that section 13A ought to be amended to permit exemption from disclosure in a statement of reasons of information that would, or could reasonably be expected to, have a substantial adverse effect on the ability of the Commonwealth Government to manage the economy (cf FOI Act, s.44).

CHAPTER 4

RATIONALE FOR SCHEDULE 2 EXCLUSIONS

History of Schedule 2

147. The history of schedules 1 and 2 to the ADJR Act was set out in paragraphs 213 to 216 of the Council's Report No. 32, *Review of the Administrative Decisions (Judicial Review) Act: the Ambit of the Act*. It is convenient again to set out that history in this report.

148. The ADJR Act as originally enacted applied to a decision of an administrative character made under an enactment other than a decision by the Governor-General. There were no exclusions from the ambit of the Act by means of Schedule 1 or Schedule 2. However, section 19 of the Act provided that regulations might declare a class or classes of decisions to be decisions that were not subject to judicial review under the Act. The intention was that the Act would not be brought into operation until a study had been made of what, if any, exclusions from its ambit ought to be made by way of appropriate regulations under section 19. The question of what, if any, exclusions should be made was referred to the Council for examination and report. In consultation with Commonwealth departments and agencies, the Council conducted an intensive investigation. It reported to the Attorney-General in October 1978 (Report No 1, *Administrative Decisions (Judicial Review) Regulations*, unpublished; see extract in the Council's *Third Annual Report 1979*, Appendix 1).

149. The Council's report was examined by the government. The conclusions that the government reached on the question of exclusions were summarised as follows by the then Attorney-General, Senator Durack, in his second reading speech on the *Administrative Decisions (Judicial Review) Amendment Bill 1980*:

> In the first place it is clear, as a result of the Council's investigation of the matter, that there are some circumstances in which it would not be appropriate to lay on decision makers the obligation to give full written reasons for their decisions, but equally it would not be proper to withdraw the decisions concerned from review by the Federal Court. The inappropriateness of requiring written reasons to be given will generally arise by reason of the nature of the decision in question. As the Act stands, there is no provision to exclude classes of decisions only from the obligation to give reasons. Exclusion must be from the whole Act. It therefore became clear that the Act ought to be amended to allow some classes of decisions to be excluded from the obligation to give reasons without, at the same time, excluding those decisions from review by the Federal Court. (Hansard, *Senate*, 21 May 1980, 2573).

150. Those conclusions were given effect to in the amending Bill. The Bill inserted 2 schedules in the Act. Schedule 1 listed the classes of decisions which were to be excluded from the operation of the Act as a whole. Schedule 2 listed the classes of decisions which were to be excluded from the obligation to give a statement of reasons. Many amendments have been made to both schedules since then.

151. The Council was not formally consulted on the decision to include Schedule 2 in the ADJR Act and thereby to set up a dichotomy between the ambit of review under the Act and the ambit of the reasons requirement. In its report the Council had commented on the undesirability of separating the right to reasons from other provisions of the Act. The

Council had commented that the duty to give reasons was an important element of a reformed judicial review process and without statements of reasons the other reforms sought to be achieved by the Act might lose some effect.

Should reasons be coextensive with review under the Act?

152. There are strong arguments for saying that to provide for judicial review of a decision without providing for a facility to obtain a statement of reasons for the decision is to provide a truncated and inadequate form of review. Some of the grounds of review set out in sections 5 and 6 may be difficult or impossible to establish in the absence of a means of requiring the decision maker to provide a statement setting out the findings of fact, referring to the material on which the findings were based and giving the reasons for the decision. For example, it may be virtually impossible without such a statement to determine whether a decision could be challenged on the ground of the taking of an irrelevant consideration into account or failing to take a relevant consideration into account (ss.5(1)(e) and 5(2)(a) and (b)) or on the ground that there was no evidence or other material to justify the making of the decision (ss.5(1)(h) and 5(3)).

153. The view that the scope of the classes of decisions to which section 13 applies should be coextensive with the scope of the classes of decisions in respect of which judicial review under the Act is available was put by Senator Gareth Evans in debate in the Senate on the *Administrative Decisions (Judicial Review) Amendment Bill 1980*. Senator Evans said:

> In all the categories and the classes of decisions which are set out in Schedule 2 there is a right of review. That notional right is retained but a person is unable to take advantage of the threshold right to get a written statement of reasons from the department or official involved as to why the decision was made in the first place. This is of crucial importance because it has been universally recognised that without a threshold entitlement to get a statement of reasons where a person has been pushed around by a department or a bureaucrat it is almost impossible credibly to found a later court action for review of the decision in question. As a practical matter it is an indispensable minimum threshold requirement that if a person is to take advantage of his or her rights under this legislation that he or she receives this statement of reasons. To exclude the right to reasons while retaining the right to judicial review is to give applicants for review a non-right. It is a nonsense. It is like Hamlet without the ghost. It is a piece of legislation which is entirely cosmetic to the extent that it purports to give a right of review because it is a right of review which in practice will be unable to be exercised. (Hansard, *Senate*, 20 August 1980, 157)

154. In a subsequent exchange with the then Attorney-General Senator Durack, Senator Evans mentioned the fact that under the prerogative writs, where unless statute has intervened no right to reasons exists, most of the contexts in which individuals had succeeded in the grant of a writ had been where review was sought of a tribunal decision of one kind or another where there had been some form of record which provided an explanation of the decision.

155. The main arguments that administrators have advanced against a general requirement to provide reasons for all decisions within the scope of the ADJR Act are:

- the workload involved;
- the need to protect confidential or otherwise sensitive information;
- the use of section 13 requests in a frivolous or vexatious manner in an attempt to hinder the effective operations of an agency;

- the unfair position in which government bodies in competition with private enterprise organisations would be placed if the former were to be bound to reveal the basis for their commercial decisions.

Each of these arguments is now considered.

Workload

156. Responding to section 13 requests inevitably has an impact on an agency's resources. Sometimes the workload argument is put on the basis that diversion of an undue proportion of an agency's resources to complying with the requirements of the section may prejudice the timeliness and efficiency of the delivery of an agency's services to the public generally.

157. The evidence that this has in fact happened in areas where there have been relatively high numbers of section 13 requests is hard to find. In fact, many agencies in these areas have reported improvement in decision making standards as a result of the availability of the facility for persons whose interests are affected by decisions to request statements of reasons for those decisions. The improvement has occurred because of the need for decision makers to reach decisions which they may be called upon to justify. Undoubtedly costs are involved that would not be involved if a requirement to provide reasons on request did not exist but those costs should be regarded as part of the ordinary costs of proper administration. In any event, the calculus of costs needs to take into account the costs to public administration generally that would be incurred if statements of reasons were not available as an integral part of decision making. Those costs would include the costs of increased resort to the services of the Ombudsman or to other complaint investigation mechanisms and the costs of an undoubted increase in ministerial representations.

158. A further answer to the workload argument is provided by the statistics concerning the use of section 13. They are set out in tables 1 and 2. The statistics show that the provision of statements of reasons under the section is now only a minor incident of the general administrative process. Although the 1987 figures do not include figures from the Office of ACT Administration, Department of Transport and Communications and Department of Veterans' Affairs, it can be seen that the number of requests for statements of reasons declined dramatically in 1987 in comparison with figures for previous years. The decline continued in 1988 and 1989.

159. The large reduction which occurred in 1987 may have been contributed to by the amendment of Schedule 2 to the ADJR Act made by the *Public Service Legislation (Streamlining) Act 1986*. As from 1 January 1987, that Act excluded decisions concerning promotions, transfers or promotion appeals of or by officers of the Australian Public Service from the classes of decisions for which a statement of reasons may be obtained. On the other hand, the reduction may have been due to other causes. The Public Sector Union, in its submission, queried whether there was any evidence which demonstrated that the reduction was due to the change made by the Public Service Legislation (Streamlining) Act. The Law Society of the ACT and the Attorney-General's Department suggested that the decline may be due to the fact that many agencies now have a welcome propensity to supply reasons for their decisions simultaneously with notification of the decisions.

160. The fall in the number of requests from 1988 to 1989 supports the latter views. Indeed, if the statistics are anything to go by, it would seem that the existence of section 13 is having its desired effect upon the consciousness of decision makers in promoting improved

standards of decision making. Decisions that are properly made and explained can be expected to lead to reduced recourse to section 13 by persons whose interests are affected by them.

Table 1 Requests for statements of reasons and refusals of requests

			Why Refused					
Year	*Total requests for reasons*	*Number refused (a)*	*Not subject to s.13 (b)*	*Reasons already given (c)*	*Request out of time (d)*	*No person aggrieved (e)*	*Not in proper form (f)*	*Other (g)*
1982	911	41 (5%)			No Breakdown			
1983 (h)	1832	67 (4%)	14	12	13	8	0	0
1984	2677	130 (5%)	63	6	22	30	7	2
1985	1807	125 (7%)	86	4	16	14	5	0
1986	1755	145 (8%)	96	10	17	15	4	3
1987 (i)	587	130 (22%)	79	9	5	25	7	5
1988	427	61 (14%)	16	0	5	5	32	18
1989	284	43 (15%)	22	0	7	3	1	17

Source: *Administrative Review Council annual reports*

Notes

(a) In some of the years the figure given for the total number of refusals does not equate with the break-up of the categories of reasons for refusal

(b) s.13(11) - this would include decisions specified in Schedule 2 and decisions not subject to the Act, ie not made under an enactment

(c) s.13(11)(b)

(d) s.13(5) - request not made within 28 days or a reasonable time from receipt of decision

(e) s.13(1) - to be entitled to a statement of reasons a person must be entitled to make an application under section 5, ie he or she must be a person aggrieved

(f) cf para. 54 above

(g) s.13A(1)(b) (i) - information that was supplied in confidence (13 cases) s.13A(1)(b)(ii) - publication would reveal a trade secret (6 cases)
s.13A(1)(b)(iv) - furnishing of information would breach a secrecy provision (8 cases)
s.14 - certificate by the Attorney-General that disclosure of information would be contrary to public interest (1 case)

(h) The figures for reasons for refusal for 1983 only relate to the 6 month period July-December 1983

(i) There is a significant discrepancy between the 1987 figure (587) appearing in the ARC's *Twelfth Annual Report 1987-88* and the 1987 figure (499) appearing in the *Thirteenth Annual Report 1988-89*.

Table 2
Statements of reasons where certain information excluded

	Reason given for exclusion				
Year	*information supplied in confidence s.13A(1)(b)(i)*	*trade secret s.13A(1)(b)(ii)*	*given under statutory duty s.13A(1)(b)(iii)*	*secrecy provision s.13A(1)(b)(iv)*	*A-G's certificate s.14*
1984	25(a)		2		5
1985	61(b)				3
1986	8			1	2
1987(c)	9	2	2		
1988(c)	38		2		
1989	9			8	

Source: Administrative Review Council annual reports

Notes
(a) 23 of the 25 related to the Department of Immigration and Ethnic Affairs
(b) 56 of the 61 related to the Department of Immigration and Ethnic Affairs
(c) All related to the Australian Taxation Office

161. Table 3 below appears to indicate that, at least until 1988, resources involved in responding to requests for statements of reasons decreased in absolute terms while average staff hours per request remained steady. The trend prior to 1988 suggests greater familiarity by agencies with the requirement to provide statements of reasons and the development of procedures having the effect of making their production less time consuming.

162. The 1988 figure for average staff hours per request is a result of very large average staff hours recorded by the Aboriginal Development Commission (average of 21.25 for total of 3 requests), the Department of Community Services and Health (average of 50.62 for total of 25 requests) and the Department of Primary Industries and Energy (average of 146 (ie approx 22.5 days!) for total of 2 requests). The 1989 figures for average staff hours per request is significantly influenced by the 3 requests finalised during the year by the Anti-Dumping Authority. Those 3 requests each involved an average of 133.33 staff hours. The 1988 and 1989 figures tend to show that, while across the broad spread of Commonwealth administration the preparation of statements of reasons is not a significant resource issue, new or complex areas of the administration have the propensity to involve an increase from the norm in the workload associated with dealing with requests for reasons.

163. If Schedule 2 were to be removed and if the ambit of the Act were to be extended, a greater burden would, of course, be placed on agencies in responding to section 13 requests. However, as mentioned in chapter 2, a section 13 statement does not require the precision or depth of a legal exegesis and, if suitable procedures are developed and decision making is well documented, any extension of the obligation to provide reasons need not be onerous.

Table 3
Resources involved in providing statements of reasons

Year	*Writing Response staff hours*	*Other work staff hours*	*Total staff hours*	*Average staff hours per request(a)*
1983 (b)	4283	1199	5472	5.00
1984	10542	2533	13075	6.35
1985	6701	1463	8164	4.67
1986	6978	3050	10028(c) (8200)	6.14(c) (5.00)
1987 (d)	1173	558	1731	5.3
1988 (d)	3335	1401	4736(e)	10.5
1989 (d)	2423	664	3087	11.8

Source: *Administrative Review Council annual reports*

Notes
(a) Obtained by dividing total staff hours by total requests (being total finalised requests less withdrawn requests)
(b) The figures for 1983 are only for a 6 month period (June-December)
(c) In 1986 the staff hours used by the Department of Aviation increased by approximately 1800 hours over its figure for 1985. This was due to extensive and complicated litigation by the

airlines. If this one off figure is excluded, the total staff hours used in 1986 is 8,200 and the average staff hours is 5.00

(d) The figures for 1987, 1988 and 1989 are incomplete as the Department of Immigration, Local Government and Ethnic Affairs did not provide information in those years and the Department of Arts, Sport, Environment, Tourism and Territories and the Australian Taxation Office did not provide information in 1989

(e) Most of the staff hours concerned 2 agencies, the Australian Taxation Office (1126) and the Department of Community Services and Health (2889)

164. The workload argument has been put with particular vigour in the area of personnel decisions and, in particular, in the area of promotion and appeal decisions. It was largely as a result of acceptance by government of concerns that had been expressed concerning workload issues that the amendment of Schedule 2 previously referred to was made to remove this area from the scope of the reasons entitlement. The workload argument in this context is dealt with in chapter 5 in the discussion of paragraphs (r) and (s) of Schedule 2, which set out the relevant exemptions.

Protection of confidential or sensitive information

165. Sections 13A and 14, which have previously been discussed, are aimed at preventing the disclosure of information that is confidential or sensitive. The extent to which those sections require amendment to further extend the protection which they presently afford has been examined in chapter 3.

Use of section 13 to hinder the effective operations of an agency

166. A number of agencies when commenting on the Council's 1984 Issues Paper on the ADJR Act argued that section 13 either was used, or had the potential to be used, in a vexatious manner in an attempt to hamper the operations of the decision maker. It was said, for example, that a person might request reasons for a promotion decision even though the person had no intention of making a judicial review application nor even a real interest in the decision.

167. It is difficult to see how section 13 could in fact be used in a vexatious manner. In the first place, persons seeking statements of reasons must have the requisite standing. If they do not, their requests may be refused. Secondly, a vexatious use of section 13 is not demonstrated merely because the person seeking reasons has no intention of seeking review of the decision. The basis of section 13 is that individuals have a right to know the reasons for a decision that affects them, irrespective of any intention on their part to bring an application for review.

Bodies in competition with private enterprise organisations

168. Perhaps the most persuasive case against a requirement that a statement of reasons be able to be requested in respect of public sector decisions relates to the decisions of commercially competitive statutory authorities in respect of their commercial activities. Paragraph (k) of Schedule 2 presently exempts from the requirements of section 13 the decisions of several authorities in respect of their commercial activities. The Australian Postal Commission argued in its submission that the exemption ought to be extended to it. The Australian Trade Commission has also sought an exemption.

169. The Attorney-General's Department, the Department of Administrative Services, Mr L J Curtis and the Administrative Law Section of the Law Institute of Victoria expressed general support in their submissions for an all embracing exemption of all agencies in respect of their commercial decision making. Some of these submissions expressed the view that, consistently with section 7 and Part II of Schedule 2 of the FOI Act, reasons for decision should be precluded only if the decisions related to the competitive commercial activities of the agencies.

170. The main arguments against the exposure of the commercial decisions of government business enterprises to the reasons requirement are:

- the obligation to provide reasons would place the bodies at a disadvantage as against their competitors;
- information disclosed in statements of reasons could be used by competitors to the detriment of the bodies;
- there are some instances where the giving of reasons would be inappropriate on commercial grounds as negotiations, etc, may be affected;
- the policy behind the creation of commercially competitive statutory authorities is to place them in a competitive position with their private sector counterparts, and an obligation to provide statements of reasons for decisions is not consistent with that policy.

171. Many of the bodies presently listed in paragraph (k) are either fully exempt from the FOI Act or exempt in relation to documents in respect o f their competitive commercial activities (FOI Act, s.7 and Schedule 2). It can be argued that, if information is not required to be released under the FOI Act because of the particular body's commercial nature, then, by analogy, that information should not be disclosed in a statement of reasons. On the other hand, as was mentioned in chapter 3, the FOI Act serves a different purpose from a statutory requirement to provide a statement of reasons to a person aggrieved by a decision. The relevant object of the FOI Act is to create a general right of access to information in documentary form limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities (FOI Act, s.3(1)(b)). Anyone may make an FOI application, whereas a person must have standing as a person aggrieved by a decision to request a statement of reasons for the decision. It can therefore be argued that the case for an exemption is stronger in relation to the FOI Act than it is in relation to the ADJR Act.

172. Nevertheless, where the competitive commercial activities of a body are concerned, the Council considers that, for the reasons set out above, there is a case for protecting relevant information from disclosure. The Council is not, however, of the view that it is appropriate that commercial decision making, or competitive commercial decision making, as a class be exempted from the scope of the reasons requirement. If a decision has been taken by government to establish a particular authority under an Act of the Parliament, the decisions that the authority makes are required to be decisions that are properly within the scope of its statute and the public has an interest in ensuring that appropriate mechanisms of accountability exist. It would be different if the particular body were not created by statute but were incorporated under the companies legislation and subject to the controls of that legislation and to the scrutiny of its shareholders or members. It seems to the Council that, if there is a concern about the subjecting of a particular body to the normal incidents of proper administrative decision making, including the making available of reasons for decisions upon request to those whose rights or interests are affected by them, the appropriate course

is to recognise that the particular body should not be established to carry out public functions under statute but should draw its corporate personality from incorporation under the companies legislation.

173. In this regard, the Council notes the steady reduction that has occurred in the past couple of years in the numbers of statutory authorities specified in paragraph (k). This reduction has occurred as a consequence of the enactment of legislation 'corporatising' authorities specified in the paragraph. Corporatisation involves conversion of the statutory authority concerned into a public company all the shares in which are held by the Commonwealth (see, eg, *ANL (Conversion into Public Company) Act 1988* and *Commonwealth Serum Laboratories (Conversion into Public Company) Act 1990*). Corporatisation of government business enterprises is seen by the government as a means of improving the business performance of those enterprises.

Recommendation 10: Information relating to the competitive commercial activities of an agency
Section 13A ought to be amended to provide that the section applies in relation to any information to which a request under subsection 13(1) relates, being information which would, or could reasonably be expected to, adversely affect an authority of the Commonwealth in respect of its competitive commercial activities.

Conclusions

174. Submissions to the Council supporting the view that the scope of the entitlement to reasons should be the same as the scope of the entitlement to seek review were made by the Victorian Bar Council, the Department of Foreign Affairs and Trade and the Legal Aid Commission of NSW. The Victorian Bar Council expressed the view that the ADJR Act should be amended to abolish Schedule 2 and to ensure that reasons are available for all decisions made under an enactment which are not otherwise exempt from review. The Legal Aid Commission of NSW made the point that the ambit of judicial review is, in reality, dependent upon the extent to which decision makers provide statements of reasons for their decisions. The Commission said:

> In considering whether or not particular classes of decision should attract the duty to provide a statement of reasons one is in effect considering whether or not those classes of decisions will attract judicial review.

175. The principle that reasons should be available for all decisions which come within the scope of review under the Act is, in the Council's view, compelling. It is neither logical nor consistent with the requirements of justice that the position under the ADJR Act be maintained where, in respect of certain classes of administrative decisions, aggrieved persons are given an entitlement to apply to the Federal Court for an order of review but are denied an entitlement to a statement of reasons. Notwithstanding the views that, until now, have prevailed, the Council considers that the principle that reasons should be available for reviewable decisions ought to be reflected in the ADJR Act and, as a consequence, that Schedule 2 ought to be repealed.

176. It will be said, as the Attorney-General's Department said in its submission, that the preservation of class exclusions in Schedule 2 minimises unnecessary work for administrators. The Council would respond to this argument by saying that, while it is no doubt true that the existence of Schedule 2 makes life easier for administrators, that cannot provide a justifiable ground for perpetuating the illogicality of the schedule. The Act was

constructed on the basis that there would need to be mechanisms for protecting certain information from disclosure in statements of reasons. Sections 13A and 14 provide those mechanisms. There is no warrant for the grafting on to that structure of a mechanism providing for a complete exemption from section 13.

177. The approach that there ought to be no class exclusions from section 13 is supported by democratic principle. It can be argued that, under a government of laws which draws its validity from the will of the people, all decisions made under those laws which affect individual rights, entitlements or obligations should attract an entitlement to a statement of reasons if requested by the individual concerned. Only if statements of reasons are available are individuals in a position to see whether decisions affecting them have been made within the law and not arbitrarily. Furthermore, nothing less than an entitlement to be told why a particular decision was made would seem adequately to reflect community expectations about what is required under appropriate standards of administrative justice.

178. If a decision made by an administrator presently falls within one of the excluded classes in Schedule 2, it is not as if the decision cannot be supported on any basis of reason. Certainly, it would be a matter of great concern if it could not be so supported. The fact that reasons are undoubtedly as capable of being assigned to these classes of decisions as to any other supports the argument that they should not form a special category of administrative decisions. Professor D.J Galligan has put the matter this way ('Judicial Review and the Textbook Writers' (1982) 2 Oxford Journal of Legal Studies 257, 273):

> If discretion is being exercised rationally there will be reasons, and there is no good reason for not making them known.

179. In the next chapter of this report each of the classes of decisions presently set out in Schedule 2 is separately considered in the light of the recommendation that the schedule be repealed and in the light of submissions made to the Council on those classes of decisions.

Recommendation 11: Repeal of Schedule 2
Schedule 2 ought to be repealed.

Exclusion by regulation of classes of decisions from section 13

180. Subsection 13 (8) provides that the regulations may declare a class or classes of decisions to be decisions that are not decisions to which section 13 applies. The only regulations which have been made are the recent regulations exempting decisions of the Superannuation Fund Investment Trust in respect of its commercial activities. It follows from recommendation 11 that the Council would recommend that those regulations be repealed.

181. Subsection 13 (8) is like section 19, which provides for the making of regulations declaring a class or classes of decisions to be decisions that are not subject to judicial review under the Act. In Report No 32 the Council recommended that section 19 be amended by the insertion of a sunset provision bringing regulations made under the section to an end 12 months after the day on which they take effect.

182. The question arises whether a similar recommendation should be made in relation to regulations made under section 13 or whether subsections (8), (9) and (10) ought to be repealed in consequence of acceptance of the principle that the scope of judicial review under the Act and the scope of the obligation to provide reasons for decision upon request should

be one and the same. It follows from what the Council has said above that the Council considers the repeal of those subsections to be the appropriate course. Again the point is made that, if in an extraordinary case the government takes the view that a facility for aggrieved persons to obtain reasons for a particular class of decisions should be denied, the appropriate course is to remove that class of decisions from the scope of the Act.

Recommendation 12: Exclusion of classes of decisions by regulation
Subsections 13(8), (9) and (10) ought to be repealed.

Keeping of records concerning use of section 13

183. The statistics in tables 1, 2 and 3 above are derived from returns provided by agencies to the Attorney-General's Department. The institution of systems in agencies for keeping records relating to requests for reasons and the furnishing of annual returns based on those records followed acceptance by the government of the recommendation made by the Council in Report No 9, *Administrative Decisions (Judicial Review) Amendment Bill 1980* (unpublished report, the text of which appears in Hansard, *Senate*, 20 August 1980, 151-3), that Departments arrange for records to be kept of the operation of the ADJR Act and, in particular, of cases of refusal of statements of reasons and of notices under subsection 13A(1). This recommendation was made so that records would be available to facilitate future review of the Act.

184. Various submissions made to the Council addressed the question of the keeping of records concerning the use of section 13. Most considered that records should continue to be kept. However, certain government agencies considered that the keeping of records served no useful purpose (Patent Attorneys Professional Standards Board) or was of little benefit (Australian Customs Service, Australia Post, Department of Community Services and Health).

185. The Attorney-General's Department noted that some agencies now supply to it only incomplete statistics. Agencies have suggested to the Department that the necessary records should no longer be kept by them, as they do not have the staff resources to maintain them. The Department correctly observed that the statistics are valuable only to the extent that they are believed to be accurate and are in fact accurate. It said that the value of keeping the statistics was seriously diminished where there was significant doubt about their accuracy.

186. The Council finds it difficult to believe that agencies would not have systems that are capable of readily recording the relevant information concerning use of section 13. Furthermore, the Council agrees with the point made in the submission of Mr L.J Curtis that effective compliance with the ADJR Act should be seen as one of the performance indicators for proper decision making and that an agency cannot know how it is performing with respect to its legal obligations under section 13 unless it keeps proper records.

187. The Council is of the view that agencies should keep records concerning the use of section 13. They should record the number of requests made for statements of reasons, the number of requests refused and the grounds of refusal, the number of statements of reasons where information to which section 13A applies was not included and the grounds for its non-inclusion and the number of cases where a certificate of the Attorney-General under section 14 was given. The keeping, in addition, of records of total staff hours in preparing statements of reasons would appear no longer to be necessary. The measurement of staff hours does not go to the issue of compliance with section 13 and the figures kept to date

show what might be expected in any event, namely, that new or complex areas of decision making will involve heavier staff resources than other areas of decision making.

188. In its submission, the Attorney-General's Department suggested that, as the Council was most active in the continual monitoring of administrative law, the function of obtaining returns from agencies of the information recorded should pass from the Department to the Council. The Department had raised this matter in previous correspondence with the Council. At that time the Council pointed out that it did not have the resources which could be devoted to the task. That remains the case. The better solution, in the Council's view, is to avoid the problem of resources associated with the obtaining of returns from agencies by requiring them to include the relevant information in their annual reports which the responsible Minister lays before the Houses of the Parliament. The administration of section 13 by agencies could then be a matter which the Houses of the Parliament could scrutinise as part of their scrutiny of annual operations of agencies.

189. If the government accepts the Council's recommendation that information concerning the use of section 13 be included in annual reports of agencies, the Council would be looking to the Attorney-General's Department to prepare a letter to all agencies for signature by the Attorney-General informing them that the government had accepted the Council's recommendation and asking that they ensure that the relevant information is included in their annual reports.

Recommendation 13: Returns concerning use of section 13

(1) All government agencies ought to keep records concerning the use of section 13, which record:

- **(a) the number of requests made for statements of reasons;**
- **(b) the number of requests refused and the grounds of refusal;**
- **(c) the number of statements of reasons where information to which section 13A applies was not included and the grounds for its non-inclusion;**
- **(d) the number of cases where the Attorney-General gave a certificate under section 14.**

(2) Annual returns setting out this information should be included in the annual reports of agencies.

CHAPTER 5

CLASSES OF DECISIONS SPECIFIED IN SCHEDULE 2

190. The examination in chapter 4 of the rationale for Schedule 2 led to the conclusion that it was not appropriate for the ADJR Act to continue to maintain a dichotomy between the scope of judicial review under the Act and the scope of the facility to obtain reasons for decisions. That chapter therefore recommended that the schedule be repealed but that section 13A be expanded to ensure that protection from disclosure was available in relation to certain kinds of information that it is not in the public interest to have disclosed. In this chapter each of the classes of decisions presently set out in the schedule is considered in the light of that recommendation and having regard to the submissions made to the Council on the exclusions made by the schedule.

Decisions with respect to personnel matters within the Defence Force (paragraphs (a) and (b))

191. Paragraphs (a) and (b) refer to decisions in connection with Defence Force grievance and personnel management matters. In a submission to the Council on its 1984 Issues Paper on the ADJR Act, the Department of Defence said that the unique nature of the Defence Force and the requirements of effective command and discipline necessitated the exemption of the classes of decisions referred to in paragraphs (a) and (b) from the requirement to give reasons. The Department went on to say that the facility in section 14 for the giving of a certificate by the Attorney-General to exempt certain information from disclosure in a statement of reasons was not sufficient for Defence Force purposes.

192. The Council notes that the decisions referred to in paragraphs (a) and (b) are within the jurisdiction of the Defence Force Ombudsman under the Ombudsman Act. While the Ombudsman does not have jurisdiction to investigate action relating to employment matters in the public service, all service matters within the Defence Force are within the jurisdiction of the Defence Force Ombudsman.

193. In its submission on the Council's discussion paper the Department of Defence said that it now provides applicants for redress of grievance with detailed statements of reasons for decision. It therefore saw no difficulty with the removal of the exemption from the reasons requirement of the class of decisions presently set out in paragraph (a) of Schedule 2.

194. Paragraph (b), in referring to personnel management decisions within the Defence Force, is in similar terms to paragraph (a), which relates to personnel management decisions in the Australian Public Service or in public employment other than under the Public Service Act. Paragraph (b) is, however, broader in its scope than paragraph (a) because it expressly encompasses personnel management decisions relating to particular persons.

195. The submission of the Department of Defence in connection with the Council's discussion paper did not address paragraph (b). No doubt the reason was that the discussion paper suggested that the paragraph should continue to support an exemption from the reasons requirement for personnel management decisions within the Defence Force.

196. In the Defence Force context, those decisions would include decisions concerning the deployment of members of the Defence Force for military purposes. The Council accepts that exposure of these decisions to section 13 is not appropriate. Consistently with the view taken by the Council in chapter 4, therefore, the Council considers that they ought to be excluded entirely from the scope of the ADJR Act. Their exclusion would appear to be consistent with the decision of the High Court in *Coutts v Commonwealth* (1985) 157 CLR 91 in which a majority of the High Court held that the dismissal of an officer of the Defence Force was not open to judicial review on the grounds of breach of natural justice.

197. In *R v Toohey; ex parte Northern Land Council* (1981) 151 CLR 170, 219-20 Justice Mason referred with approval to certain observations in United Kingdom case law which suggested that the exercise of the royal prerogatives relating to war was non justiciable. While in the Australian context the relevant decisions have a statutory basis, it can be argued that the considerations upon which those observations were founded are also relevant in Australia.

Recommendation 14: Defence Force personnel management decisions
Schedule 1 to the ADJR Act ought to be amended to include decisions in connection with personnel management (including recruitment, training, promotion and organisation) with respect to the Defence Force, including decisions relating to particular persons.

Consular and diplomatic privileges and immunities decisions (paragraph (c))

198. The Acts referred to in paragraph (c) of Schedule 2 give effect to certain provisions in international conventions relating to consular and diplomatic privileges and immunities. The legislation appears to contain few provisions for the making of administrative decisions. One example of an administrative decision making power in the *Consular Privileges and Immunities Act 1972* is the power given to the Minister under section 13 to withdraw the privileges and immunities of a consular post in Australia of a foreign country in certain circumstances. The person aggrieved by any decision to withdraw privileges and immunities would presumably be the foreign country or its representative.

199. The Department of Foreign Affairs and Trade in its submission said that it went almost without saying that the administrative law package was not introduced into Parliament for the benefit of the diplomatic and consular community. The Department said that, as it saw matters, the decisions likely to be involved are decisions relating to the level of protection given to diplomatic and consular premises and to the amount of duty free goods permitted into the country.

200. So far as the Council is aware, no decision has, to date, been made by Australia withdrawing any privileges or immunities from a diplomatic or consular post in Australia.

201. The Council agrees with the Department of Foreign Affairs and Trade that, if disputes exist between Australia and representatives of the diplomatic or consular community on matters that may be the subject of decisions under the Acts, it is far preferable that they be settled by the traditional diplomatic means of discussion, consultation and negotiation and not by resort to the formal mechanisms of Australian legislation. This mode of proceeding is consistent with international practice in the conduct of diplomatic and consular relations. The Department of Foreign Affairs and Trade pointed out that the Vienna Convention on Diplomatic Relations provides expressly, in article 9, that a receiving state may 'at any time and without having to explain its decision, notify the sending state that the head of mission or any member of the diplomatic staff of the mission is *persona non grata*'.

The Department's submission went on to say that reciprocity is always available as a remedy in the conduct of diplomatic relations.

202. Having regard to the above considerations and to the principle that the scope of the reasons requirement should be coextensive with the scope of judicial review under the Act, the Council considers that the decisions referred to in paragraph (c) of Schedule 2 should be excluded from the ADJR Act by an appropriate amendment of Schedule 1. The Department of Foreign Affairs and Trade expressed support in its submission for this course.

Recommendation 15: Consular and diplomatic privileges and immunities decisions
Schedule 1 to the ADJR Act ought to be amended to include decisions under the *Consular Privileges and Immunities Act 1972*, the *Diplomatic Privileges and Immunities Act 1967* and the *International Organisations (Privileges and Immunities) Act 1963*.

Decisions under the Migration Act (paragraph (d))

203. Paragraph (d) excludes from the statements of reasons requirement the following decisions under the Migration Act 1958:

- decisions under section 34 (still referred to in paragraph (d) by its old number, section 11Q) refusing entry permits to persons who do not hold visas or who are outside Australia;
- decisions in connection with the issue or cancellation of visas;
- decisions whether a person is an exempt non citizen by virtue of being a diplomatic or consular representative of a foreign country or a member of the consular or diplomatic staff.

204. Under the system of review on the merits that now applies under the Migration Act, review on the merits is available (see Migration Act, ss.115 and 120, Migration (Review) Regulations, reg. 3) in relation to decisions refusing to grant a visa and in relation to decisions refusing to grant an entry permit (except where the application for the entry permit was able to be made only because the person's circumstances had changed since the person last made an application for an entry permit). If the fee for internal review is paid in relation to these decisions, regulation 8 of the Migration (Review) Regulations requires the review officer to give the person who sought the review a notice setting out the decision of the review officer and 'the reasons for the decision, including brief reference to the findings and evidence on any material questions of fact'.

205. Why the reasons requirement in this regulation is framed this way is difficult to understand. Presumably it is felt that the formulation carries a different meaning from the formulation in section 13 of the ADJR Act. However, it is doubtful whether there is a valid basis for this recasting of the formulation. Indeed, it would appear to reveal some misunderstanding of what the formulation in section 13 requires of the relevant decision maker.

206. The availability of statements of reasons outside the context of review on the merits is a most complex issue. The effect of subparagraph (d)(i) of Schedule 2 to the ADJR Act would appear to be that a full statement of reasons under section 13 is available in relation to a decision refusing to grant an entry permit if the person holds a valid visa or if the decision relates to a person who is in Australia. On the other hand, decisions refusing to grant a visa, although subject to appeal on the merits, do not, by virtue of subparagraph (d)(ii) of Schedule 2, attract statements of reasons under section 13. Decisions cancelling visas and the

classes of decisions set out in subparagraphs (d)(iii) and (iv) of Schedule 2 are neither subject to appeal on the merits nor attract statements of reasons under section 13.

207. Not only is the mesh of provisions complex, but it also leads to some anomalous results. The Secretary to the Department of Immigration, Local Government and Ethnic Affairs said in his submission:

> At present, the anomalous situation exists where an illegal entrant is entitled to request a statement of reasons regarding a decision made in relation to him or her; the spouse of an Australian citizen seeking a spouse visa has no such entitlement.

208. If paragraph (d) of Schedule 2 were to be repealed, the obligation to provide aggrieved persons with reasons on request would, for the first time, attach to:

- decisions refusing to grant entry permits to persons who do not hold valid visas and to persons outside Australia;
- decisions refusing to grant or cancelling visas; and
- adverse decisions (presumably very few in number) of the kinds set out in subparagraphs (d)(iii) and (iv) of Schedule 2.

209. On the assumption that certain individuals affected by these decisions would request reasons for them, an increased workload would be imposed on the Department. On cost benefit grounds, it might be argued that the increased workload could not be justified, particularly in those migrant entry areas where a points system applies and the person concerned has fallen well short of the necessary score.

210. Submissions made to the Council by the Legal Aid Commission of New South Wales and the Victorian Bar Council expressed support for the view that decisions refusing entry permits to persons who do not hold visas and decisions in connection with the issue or cancellation of visas should attract an entitlement to a statement of reasons upon request. The Law Society of the ACT said that it strongly supported a facility for Australian residents aggrieved by decisions relating to visas to obtain statements of reasons for the decisions. The Secretary to the Department of Immigration, Local Government and Ethnic Affairs said in his submission:

> I support an amendment to the Act which repeals the Schedule 2 exemptions as they relate to this Department, while at the same time limiting the entitlement to a statement of reasons to persons who are aggrieved by a decision to which the Act applies and who have some defined lawful connection with Australia. Such an amendment will ensure that scarce Government resources are allocated on behalf of persons who have connections with Australia. It will also avoid the resource difficulties which would arise if the Schedule 2 exemptions were to be repealed without some qualification being placed on the entitlement to a statement of reasons.

211. In the Council's view, the fact that the decisions referred to in subparagraphs (d)(i) and (ii) of Schedule 2 have the potential to have such a serious impact on the interests of individuals supplies a basis for an entitlement to reasons. Another ground for suggesting that statements of reasons should be available is that their provision would tend to lessen the number of appeals brought against those decisions which are subject to appeal on the merits. There is no doubt that if, for example, a statement of reasons were to reveal that a particular person fell well short of obtaining the necessary points for migrant entry into Australia, that would tend to discourage any appeal.

212. The Council accepts, however, that the entitlement to reasons for a decision in connection with the issue or cancellation of a visa or for a decision under section 34 of the

Migration Act should be restricted to a person who, at the time of the decision, was an Australian citizen or an Australian permanent resident (as defined in the Migration Regulations). The Council agrees with the view expressed in the submission of the Secretary to the Department of Immigration, Local Government and Ethnic Affairs that restriction of the reasons entitlement to persons who have a lawful connection with Australia is appropriate. It will not prevent a statement of reasons from being obtained in relation to a decision concerning an illegal entrant but will ensure that only an aggrieved person who has a connection with Australia is entitled to request such a statement. This result would appear to be fair, while at the same time ensuring that government resources are allocated for the benefit of persons who have connections with Australia.

213. A person who was unable to obtain a statement of reasons by virtue of the limitation would not be prevented from exercising his right to obtain documentary material under the FOI Act or by way of discovery.

Recommendation 16: Certain decisions under the Migration Act
Section 13 ought to be amended to provide that, in spite of any other provision of the ADJR Act, a person is not entitled to make a request under subsection (1) in relation to a decision under section 34 of the *Migration Act 1958* or in relation to a decision concerning the issue or cancellation of a visa unless the person is aggrieved by the decision and was, at the time of the decision:

- **the holder of a valid visa; or**
- **an Australian citizen or an Australian permanent resident (as defined in the Migration Regulations).**

214. The other decisions excluded from the statements of reasons requirement by paragraph (d) are decisions under the Migration Act relating to diplomatic or consular representatives. The Migration Act includes diplomatic or consular representatives amongst the categories of persons who are exempt non-citizens for the purposes of the Act. A diplomatic or consular representative stops being an exempt non-citizen if he or she stops being such a representative (s.9). In this event, he or she may also become an illegal entrant (s.14).

215. As mentioned above, the numbers of decisions described in paragraph (d) that are adverse are likely to be few. Presumably, the issue would be whether the particular person continued to have diplomatic or consular status. The reason for the exclusion in paragraph (d) would appear to be that a reasons statement may disclose information that would, or could reasonably be expected to, prejudice the security or international relations of Australia.

216. It seems to the Council that the decisions in question are of a somewhat different order from the decisions referred to in paragraph (c) of Schedule 2 involving the withdrawal of diplomatic privileges and immunities. Accordingly, it would not seem to be necessary to recommend their inclusion in Schedule 1, as proposed above for the decisions referred to in paragraph (c). Protection of relevant information concerning the decisions referred to in subparagraph (d)(iv) would be available by means of the giving by the Attorney-General of a certificate under section 14.

Decisions relating to the administration of criminal justice and decisions in connection with the institution or conduct of proceedings in a civil court (paragraphs (e) and (f))

217. In chapter 3 it was recommended that section 13A be expanded to protect from disclosure in a statement of reasons information concerning enforcement of the law or protection of public safety. The question is whether expansion of section 13A to ensure protection of this information is sufficient or whether the decisions referred to in paragraphs (e) and (f) of Schedule 2 should be exempted as a class from the scope of section 13.

218. The Commonwealth Director of Public Prosecutions, in his submission, argued against any change to those paragraphs. The DPP said that the fair and efficient administration of criminal justice is premised upon the avoidance of unnecessary delay and that, by their very nature, applications for statements of reasons under section 13 were bound to cause further delay in the criminal justice process and to contribute to an already overworked and delayed criminal justice system. The DPP went on to say that, even if section 13A were expanded to include the matters presently covered by section 37 of the FOI Act, the range of matters presently covered by paragraphs (e) and (f) of Schedule 2 would not be covered. One further major factor which the DPP said should be taken into account was that the purpose of section 13 in enabling a person aggrieved by a decision to find out the reasons for that decision had no application to the prosecution process. The DPP said that it is no part of a prosecutor's function to conduct trials by ambush. To this end, prosecutors sought to ensure that defendants were aware of the charges against them and of the effect of the admissible relevant evidence upon which the prosecution intended to rely. The present practice of the DPP is to provide witness statements to the defence in most, if not all, cases. In short, said the DPP, a defendant is well aware of the reasons why he has been charged well before he goes to court, and in virtually all cases is in possession of all the relevant witness statements. This was considerably more than would be available from a statement of reasons under section 13.

219. The view that paragraphs (e) and (f) of Schedule 2 should be maintained was also supported in submissions to the Council by the Attorney-General's Department and Mr L.J Curtis. The Attorney-General's Department put the view that a Schedule 2 exemption may be justified where a court, tribunal or other body is able, directly or indirectly, to review the legality of the decision concerned. The Department said that the classes of decisions specified in paragraphs (e) (f) and (m) of the Schedule all fell into this category.

220. The Council does not agree with this approach. In the Council's view, a decision that is amenable to review ought prima facie to be a decision that attracts the entitlement to a statement of reasons.

221. The provision of a facility for ensuring the non disclosure in a statement of reasons of information that ought not in the public interest to be disclosed is another question. The Council notes that some of the cases that have considered paragraphs (e) and (f) illustrate that the categories of information that would be protected from disclosure in a statement of reasons by virtue of recommendation 9 of this report deal with a more limited range of matters than those presently covered by the paragraphs.

222. In *Burswood Management Limited v Commonwealth Attorney-General* (1990) 94 ALR 220 the full court of the Federal Court held that a decision to grant legal aid under section 170 of the *Trade Practices Act 1974* is exempt from the requirement to give reasons by virtue of the operation of paragraph (f) of Schedule 2. The appellants in that case, who were involved in proceedings with other parties under the Trade Practices Act, sought review of a decision of the Commonwealth Attorney-General to grant financial assistance under section 170 of the

Trade Practices Act to those other parties. For the purposes of those review proceedings, the appellants had sought a statement of reasons in respect of the decision of the Attorney-General to grant financial assistance. The full court upheld the first instance finding that the decision to grant financial assistance was exempted from the requirement to give a statement under section 13. Their Honours held that the decision was made 'in connection with the conduct' of the trade practices proceedings.

223. *Harper v Costigan* (1983) 50 ALR 665 was concerned with a case where the applicant had sought reasons for the decision of a Royal Commissioner to summon the applicant to give evidence and produce documents at a Commission hearing. The Federal Court held that the decision was exempted from the reasons requirement because it was a decision 'relating to the administration of criminal justice' (para (e)).

224. In *Ricegrowers Co-operative Mills Limited v Bannerman* (1981) 38 ALR 535 one of the issues was whether a decision of the Trade Practices Commission to issue a notice under section 155 of the Trade Practices Act was a decision in respect of which a statement of reasons could be obtained. The full court of the Federal Court held that the decision was covered by paragraph (f) of Schedule 2.

225. Several comments may be made about these cases. First, so far as the *Burswood Management Case* is concerned, it must surely have been a real question whether the appellants had standing to bring their proceedings and to seek a statement of reasons. The full court in its judgment (p. 221) makes the observation that the respondents did not raise this issue at first instance or on the appeal. Secondly, it seems to the Council that the decisions in question in each of the cases (particularly in *Harper and Ricegrowers*) may very well be decisions that, on the authority of *Australian Broadcasting Tribunal v Bond* discussed earlier in this report, are not decisions within the meaning of the ADJR Act. Thirdly, even if the decisions do fall within the reach of the Act, it would not give rise to grave problems if section 13 were applicable, as sufficient protection would exist to prevent disclosure in a statement of reasons of information that should not in the public interest be disclosed.

226. To the extent that paragraphs (e) and (f) deal with decisions that fall within the Act, the Council does not accept that exemptions from section 13 are required.

227. The Council also does not accept all that the DPP said in its submission about the use of statements of reasons to frustrate the criminal justice process. It seems to the Council that the steps that the DPP now takes to inform defendants of the case against them eloquently raise the question why the substance of that case could not be presented in a statement of reasons, subject to the exclusion of sensitive and confidential information. If a defendant is made aware of the reasons why he has been charged well before he goes to court and in virtually all cases is in possession of all the relevant witness statements, and if this is considerably more than would be available from a section 13 statement, there seems to be no reason why section 13 statements should not be available.

228. A further point argued in the submission of the DPP was that prosecution decisions should be removed from the ambit of the ADJR Act. The argument for their removal was considered by the Council in Report No 32 where it concluded that they should continue to be amenable to review under the Act. While the Council acknowledges the thorough argument on this point that is again made by the DPP in its submission, the Council is not minded to depart from the conclusion that it reached in Report No 32. In the Council's view, the matter is sufficiently regulated through the exercise by the Federal Court of its discretion

not to grant orders of review in respect of prosecution decisions except in the most exceptional cases (see *Newby v Moodie* (1988) 83 ALR 523; *Wouters v Deputy Commissioner of Taxation* (1988) 84 ALR 577). The Council acknowledges that, in a case where an applicant decides to seek judicial review, the DPP will be put to the trouble of arguing before the Federal Court that the case is an appropriate one for exercise of the court's discretion not to grant relief, but it seems more satisfactory that there at least be the potential to obtain an order of review under the ADJR Act as a safeguard against possible abuse of prosecutorial power than that prosecution decisions be excluded as a class.

229. The effect of the landmark decision of the High Court in *Australian Broadcasting Tribunal v Bond* again has to be considered in the context of a consideration of the reviewability of prosecution decisions. A majority of the High Court said in that case that, generally, for a decision to be reviewable under the Act, it must be a decision which is final or operative and determinative in a practical sense of the issue of fact falling for consideration.

230. Further cases will be required to elucidate the effect of the decision of the High Court. It may be that prosecution decisions remain within the scope of the Act. On the other hand, the fact that they are generally regarded as unreviewable at common law may assist a contrary conclusion.

Decisions of the Minister for Finance to issue sums out of the Consolidated Revenue Fund under Appropriation Acts (paragraph (g))

231. Some may think it odd that Schedule 2 to the ADJR Act should go to the extent of excluding from the ambit of the reasons requirement a decision of the Minister for Finance to issue out of the Consolidated Revenue Fund the sum provided for in an Appropriation Act when there is nothing on the face of the ADJR Act that would prevent an application for judicial review of such a decision from being made. It might be expected that, since the ability of the administration to continue to function depends upon the Minister for Finance exercising the relevant power, any exclusion in the judicial review context relating to the Minister's decision would be an exclusion from the ambit of the ADJR Act as a whole.

232. The position is not entirely as it appears, however, since the availability of review would depend on whether the Federal Court considered such a decision to be justiciable. It is certainly arguable that it is not justiciable. The Budget allocations are determined in an exhaustive process of consideration by the Cabinet and Committees of the Cabinet and are finally approved by the Parliament when passage is given to the Appropriation Act.

233. The question whether or not the power of the Minister for Finance under an Appropriation Act to issue moneys out of the Consolidated Revenue Fund and to apply them for specified services is justiciable was one of the questions in issue in *Victoria v Commonwealth (AAP Case)* (1975) 134 CLR 338. The High Court was in that case evenly divided on the question whether the appropriation for the Australian Assistance Plan was valid. Justices McTiernan, Jacobs and Murphy were of the view that it was and, since Justice Stephen took the view that a State did not have standing to impugn an appropriation., the majority view was that the action of Victoria in seeking a declaration of the invalidity of the appropriation ought to be dismissed.

234. The majority view was that the appropriation by the Parliament of moneys of the Commonwealth to the purposes stated in an Appropriation Act could not by itself be the

subject of legal challenge (Justice Jacobs, p. 410; Justice McTiernan, p. 170), or that a State had no standing to challenge the appropriation (Justice Stephen, p. 187; Justice Murphy, p. 424).

235. On the issue of justiciability Justice Stephen said (p. 391):

> The question of justiciability is necessarily closely associated with that of standing . . . In the present case we heard no argument on justiciability; this fact, coupled with the circumstances that if proceedings impugning an Appropriation Act were to be brought by a federal taxpayer quite different considerations might arise, leads me to conclude that no general proposition as to the justiciability of allegedly ultra vires spending by the Commonwealth should be stated.

236. It is not entirely clear from this passage whether in speaking of justiciability Justice Stephen was referring to the appropriation of moneys by the Parliament for purposes stated in an Appropriation Act or whether he was referring to the power of the Minister for Finance under such an Act to issue sums out of the Consolidated Revenue Fund. In the light of *Davis v Commonwealth* (1988) 166 CLR 79, in which the High Court affirmed the *AAP Case* as authority for the proposition that the validity of an Appropriation Act is not ordinarily susceptible to effective legal challenge, it would appear that the passage ought to be understood in the former sense. In any event, little may turn on the distinction. To the extent that a challenge could be brought to the power of the Commonwealth to apply money for a purpose specified in an Appropriation Act, the challenge would essentially involve the constitutional issue whether the appropriation was authorised by section 81 of the Constitution. The High Court is the appropriate forum for the determination of such an issue. One may speculate that the inevitability of the issue being determined in the High Court provides a significant reason why it was felt unnecessary to exclude review of the decision of the Minister for Finance from the scope of the ADJR Act.

237. The Council recommended in Report No 32 that the ADJR Act ought to contain a provision requiring the Federal Court not to grant an application for a review of a decision if it is satisfied that the decision is not justiciable. Such a provision would essentially be concerned with the question of availability of review. Yet, as was mentioned in Report No 32 (para 95), the notion of justiciability has been seen by some commentators as a surrogate for standing rules. It might be said, therefore, that, just as administrators when considering a request for a statement of reasons form an opinion on whether or not the person seeking reasons is a person who is aggrieved by the decision (s.13(3)), so also they would be entitled to consider whether or not the request relates to a decision that, if review were to be sought, would be found by the Federal Court to be justiciable.

238. On the other hand, there is much to be said for the view that administration of the statements of reasons regime should be as clear as possible on the face of the legislation. This consideration has led the Council to the view that, in accordance with the principle that the scope of judicial review and the scope of the entitlement to reasons should be the same, the decisions presently referred to in paragraph (g) of Schedule 2 ought to be exempted from the scope of the Act by an appropriate amendment of Schedule 1.

Recommendation 17: Appropriation decisions
Schedule 1 to the ADJR Act ought to be amended to include decisions of the Minister for Finance to issue sums out of the Consolidated Revenue Fund under an Act to appropriate moneys out of that Fund for the service of, or for expenditure in respect of, any year.

Decisions under section 32 or 36A of the *Audit Act 1901* (paragraph (h))

239. Section 32 of the Audit Act provides for the giving by the Governor-General of a warrant to the Minister for Finance authorising the drawing of amounts from the

Commonwealth Public Account. The giving of a warrant depends on the Auditor-General first giving a certificate that the amount proposed to be withdrawn does not exceed the amount appropriated for the particular service. Amounts cannot be drawn from the Commonwealth Public Account unless a warrant is given. Subsection 32(4) provides that the Governor-General may issue a warrant without obtaining the advice of the Federal Executive Council.

240. There are three decision making powers provided for in section 32: the power of the Minister for Finance to notify the Auditor-General that an amount is required to be withdrawn from the Commonwealth Public Account; the power of the Auditor-General to give a certificate concerning the amount proposed to be withdrawn; the power of the Governor-General to issue a warrant authorising the withdrawal. Decisions of the Governor-General are not presently reviewable under the ADJR Act but, if the recommendations made by the Council in Report No 32 are implemented, such decisions would no longer be excluded from review under the Act.

241. Section 36A gives a discretion to the Minister for Finance to direct the debiting of expenditure charged to the Advance to the Minister for Finance. The Advance to the Minister for Finance is available to meet expenditure that is urgent and unforeseen. Traditionally, the debiting of amounts to the Advance to the Minister for Finance has been closely scrutinised by the Parliament, particularly through the Public Accounts Committee. The Public Accounts Committee recently criticised the Department of Finance for what the Committee considered were failures to administer the advance in accordance with the limitations applying to it.

242. The question is whether the exemption relating to the giving of reasons for the decisions provided for in sections 32 and 36A should be repealed. The likelihood of the use of a reasons entitlement for political purposes provides grounds for arguing that the decisions should not be encompassed by any such entitlement. On the other hand, as with the class of decisions referred to in paragraph (g) of Schedule 2, persons seeking reasons may find it difficult to maintain that they are persons who are aggrieved by the decisions. The potential difficulty of establishing standing might be seen as favouring an argument that there would be little harm in exposing the decisions to the reasons entitlement.

243. Notwithstanding this potential difficulty, the Council considers that, for the reasons given concerning decisions referred to in paragraph (g), the decisions referred to in paragraph (h) ought to be excluded from the scope of the Act by an appropriate amendment of Schedule 1.

Recommendation 18: Certain decisions under Audit Act
Schedule 1 to the ADJR Act ought to be amended to include decisions under section 32 or 36A of the *Audit Act 1901*.

Decisions of the Commonwealth Grants Commission relating to the allocation of funds (paragraph (i))

244. The Commonwealth Grants Commission conducts inquiries and makes recommendations concerning the granting of financial assistance to the States, the Northern Territory, the Australian Capital Territory and the Territory of Cocos (Keeling) Islands. Section 25 of the *Commonwealth Grants Commission Act 1973* empowers the Minister to cause its reports to be laid before each House of the Parliament. In the case of a report made by the

Commission concerning the grant of financial assistance to a State or the Northern Territory, subsection 25(2) requires the report to be laid before each House.

245. The only bodies who would be likely to have standing to challenge recommendations of the Commission would be the States and Territories.

246. While it is appropriate that the Commission be amenable to judicial review under the Act in respect of inquiries conducted by it, it can be argued that its decisions relating to the allocation of funds ought not to be subject to the requirement to provide statements of reasons. Matters of economic judgment and some political sensitivity are involved in the making of the decisions and the reasons for the Commission's recommendations will be found in its reports.

247. In the Council's discussion paper it was suggested that, where decisions are ones that are required to be laid before the Parliament in a written instrument, section 13 ought not to apply. It was suggested that the opportunity for parliamentary scrutiny and parliamentary questioning ought to be regarded as sufficient to ensure rational and open decision making.

248. This proposal was supported in the submission of the Department of Community Services and Health. It referred to the various determinations that under health legislation administered by it, are required to be laid before each House of the Parliament. On the other hand, the Commonwealth Grants Commission pointed out that section 25 of its Act has the effect that, although all its reports may be laid before each House, a requirement that that be done did not exist in every case.

249. One course considered by the Council was to recommend the exclusion from the scope of the ADJR Act of decisions of the Commonwealth Grants Commission relating to the allocation of funds. However, this approach would also have the effect of excluding from review conduct engaged in by the Commission in its inquiries for the purpose of making such decisions (see ADJR Act, s.6). For this reason, it would not be appropriate.

250. In the Council's view, the more satisfactory approach would appear to be to amend subsection 13(11) to exclude from the definition of decision to which section 13 applies a decision the terms of which an enactment requires be laid before each House of the Parliament and a decision the terms of which are laid before each House of the Parliament pursuant to a power conferred by an enactment. This approach too is not without difficulty because, where legislation merely empowers the tabling of the report, determination or other instrument, the decision concerned would attract reasons until such time as tabling occurred. If Parliament were not sitting, a period of some months might be involved. There does not appear to be an easy way round this difficulty. However, the number of instances in which legislation merely empowers tabling, as opposed to requiring it, are few. The number of times reasons would be sought before tabling occurred would be fewer again.

251. In proposing this amendment of subsection 13(11), the Council is mindful that a decision which is tabled will not necessarily be accompanied by a statement of reasons, let alone a statement that satisfies section 13. However, statutory provision for the tabling of a particular instrument setting out the terms of a decision would not ordinarily be made except in respect of decisions which have some of the characteristics of decisions of a legislative character in the sense that they involve matters of general concern rather than the application of a rule to a particular case. Accordingly, decisions for which the legislature makes provision for tabling will often be outside the scope of section 13 in any event.

252. In *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615 the Federal Court held that a determination made by the Minister for Community Services and Health under the *Health Insurance Act 1973* which had the effect of substituting a new pathology services table in the Act was a decision of a legislative character and was therefore unreviewable under the ADJR Act. The Health Insurance Act required the determination to be tabled in Parliament, where it was subject to parliamentary disallowance. Notwithstanding the unreviewability under the ADJR Act of the Minister's determination, the Federal Court granted to the applicants declaratory relief under section 21 of the *Federal Court of Australia Act 1976*, the Court's jurisdiction having been attracted by virtue of the applicants' alternative claim under section 39B of the *Judiciary Act 1903*. Declaratory relief was founded upon the finding of the Court that the Pathology Services Advisory Committee, in making its recommendation to the Minister, had failed to satisfy the requirements of the legislation.

253. The Council's proposal would not appear to have any bearing on a case such as this. Both the Council's proposal and the Court's conclusion that the Minister's decision was of a legislative character would have the result that section 13 would have no application.

Recommendation 19: Decisions to which section 13 applies to exclude decisions the terms of which are tabled in Parliament
Subsection 13 (11) ought to be amended to exclude from the definition of decision to which section 13 applies a decision the terms of which are required by an enactment to be laid before each House of the Parliament and a decision the terms of which are laid before each House of the Parliament pursuant to a power conferred by an enactment.

Decisions of certain tribunals (paragraph (j))

254. Paragraph (j) excludes from the reasons requirement decisions of the Academic Salaries Tribunal, Defence Force Remuneration Tribunal, Federal Police Arbitral Tribunal and Remuneration Tribunal. The Academic Salaries Tribunal and the Federal Police Arbitral Tribunal have now ceased to exist following enactment of the *Industrial Relations (Consequential Provisions) Act 1988*. Paragraph (j) will presumably be amended in due course to remove the reference to them.

255. The functions of the other two tribunals are concerned with salaries or remuneration. Their determinations or reports are required to be laid before each House of the Parliament (or, in the case of a determination under section 7A of the *Remuneration Tribunals Act 1973*, before the Legislative Assembly of Norfolk Island). In cases where determinations are involved, they are subject to parliamentary disallowance.

256. The Department of Community Services and Health in its submission argued that the Pharmaceutical Benefits Remuneration Tribunal (PBRT) should, for the sake of consistency, be included with the other remuneration tribunals in paragraph (j).

257. The Council does not agree with this suggestion. Section 98BD of the *National Health Act 1953*, in requiring the PBRT, after completion of an inquiry, to issue a statement in writing of its findings and its reasons for them, attracts section 25D of the *Acts Interpretation Act 1901*. The latter section, it will be recalled, has the effect of requiring the provision of a statement of reasons of the standard required by section 13 of the ADJR Act when an Act requires 'reasons' to be given. Section 13 does not require a separate statement of reasons in these circumstances: s.13(11)(b).

258. The PBRT circumstances do, however, suggest what should be done in relation to the findings of the remuneration tribunals currently mentioned in paragraph (j). It seems to the Council that the nature of the function performed by these bodies makes it highly desirable that their determinations or reports be determinations or reports that are accompanied by findings of fact and reasons for decision. Accordingly, the Council considers that the relevant Acts ought to be amended to require the bodies to give with their decisions a statement of reasons for the decisions.

Recommendation 20: Decisions of certain remuneration tribunals
The Acts establishing the Defence Force Remuneration Tribunal and Remuneration Tribunal ought to be amended to require the decisions of those tribunals to be accompanied by a statement of reasons.

Decisions of certain authorities in respect of their commercial activities (paragraph (k))

259. Paragraph (k) was discussed in chapter 4 where it was recommended that section 13A be amended to provide protection from disclosure of information that could adversely affect a Commonwealth authority in respect of its competitive commercial activities.

Certain decisions of the Reserve Bank (paragraph (1))

260. Paragraph (1) exempts from the statements of reasons requirement decisions of the Reserve Bank in connection with its banking operations (including individual open market operations and foreign exchange dealings). A similar exemption from the FOI Act appears in Part 2 of Schedule 2 to that Act.

261. Changes that have taken place in recent years in connection with foreign exchange control have had the effect of virtually abolishing the controls exercised by the Reserve Bank under the *Banking Act 1959*. Taxation screening in relation to foreign exchange transactions is important but the issuing of tax clearance certificates is the responsibility of the Australian Taxation Office (ATO) under Part IV of the *Taxation Administration Act 1953*. Decisions of the ATO under that part are presently exempted from review under the ADJR Act by paragraph (g) of Schedule 1 but are subject to review on their merits by the AAT. In Report No 32 the Council recommended the repeal of that paragraph.

262. The other activities of the Reserve Bank, including its open market operations, are clearly of great importance to the Australian economy. The Council accepts that, in some cases, the reasons for particular operations of the Reserve Bank are sensitive in economic terms. Although information would often be able to be protected from disclosure in a statement of reasons through the provision of a certificate of the Attorney-General under paragraph 14(l)(c) of the ADJR Act, that may, in particular instances, be a cumbersome way of proceeding. It would seem to be more appropriate if protection were able to be provided under section 13A. In the Council's view, section 13A ought to be amended to permit exemption from disclosure of any information that would, or could reasonably be expected to, prejudice the ability of the Commonwealth Government to manage the Australian economy. As previously mentioned, such an amendment would also appear to have relevance to certain decisions under the Foreign Acquisitions and Takeovers Act and under the Banking (Foreign Exchange) Regulations.

Recommendation 21: Information affecting management of economy
Section 13A ought to be amended to provide that the section applies in relation to any information to which a request under subsection 13(1) relates, being information which would, or could reasonably be expected to, prejudice the ability of the Commonwealth Government to manage the Australian economy.

Decisions in connection with the enforcement of judgments or orders for the recovery of moneys by the Commonwealth (paragraph (m))

263. The recommended amendment of section 13A concerning information affecting enforcement or administration of the law would seem adequately to deal, with information that may be involved in the making of these decisions.

Decisions of the National Director of the Commonwealth Employment Service to refer, or not to refer, particular clients to particular employers (paragraph (o))

264. In *Taranto v Madigan* (1988) 81 ALR 208 the Federal Court had before it an application for review under the ADJR Act of a decision of the Commonwealth Employment Service to deny assistance to a particular employer. The Federal Court concluded that the decision sought to be reviewed was not a decision made under an enactment but was made in exercise of general administrative power. Paragraph (o) was not referred to in the judgment. The paragraph would seem to assume that decisions of the CES to refer or not to refer particular clients to particular employers are decisions made under the Commonwealth Employment Service Act. In the light of *Taranto v Madigan*, that assumption may not be correct. Accordingly, paragraph (o) may be unnecessary.

265. In any event, the Council considers that the paragraph should no longer provide a basis for exemption from the reasons requirement. If a decision made by the CES is a decision of the kind covered by the paragraph and is a decision under an enactment, section 13A provides sufficient protection from disclosure of confidential information relating to the personal affairs or business affairs of a person.

Certain decisions under the *Civil Aviation Act 1988* (paragraph (p))

266. Paragraph (p) exempts from the statements of reasons requirement decisions relating to aircraft design or otherwise relating to aviation safety that arise out of findings on material questions of fact based on evidence or other material that was supplied in confidence or the publication of which would reveal information that is a trade secret.

267. The Attorney-General's Department in its submission queried whether, if the exemption contained in the paragraph were to be removed, it could be said that section 13A would provide sufficient protection for relevant Information. The Department pointed out that, in contrast with section 13A, it was not necessary under paragraph (p) to establish that the information or material concerned related to the personal or business affairs of a person.

268. On the other hand, it seems to the Council that, if material was supplied in confidence or if its publication would reveal information that is a trade secret, the information contained in it would almost necessarily be information relating to the business affairs of a person. Accordingly, the Council takes the view that section 13A is sufficient to deal with the material that the exemption in paragraph (p) is aimed at.

Public service personnel related decisions (paragraphs (q), (r), (s), (t) and (w))

269. These paragraphs exclude from the statements of reasons requirements the following decisions:

- decisions in connection with personnel management in the public sector (paragraph (q));
- decisions relating to promotions, transfers, temporary performance of duties, or appeals against promotions or selections for temporary performance of duties, of or by officers of the Australian Public Service (paragraph (r));
- decisions relating to transfers or promotions under section 53A of the Public Service Act (paragraph (s));
- decisions relating to the making of appointments or the engagement of employees in the public sector (paragraph (t));
- decisions relating to the making or terminating of appointments of departmental secretaries (paragraph (w)).

270. The major reason that has been given for the exclusion from the reasons requirement of the classes of decisions set out in paragraph (r) in particular is the workload involved. It was mentioned in chapter 4 that decisions concerning promotions and appeals once used to be subject to the reasons requirement. That changed with the amendment to paragraph (r) made by the *Public Service Legislation (Streamlining) Act 1986*. Another change made by the Act was to remove rights of appeal on the merits against promotions to middle management levels and above.

271. The intention of the exemption in paragraph (q) is to exempt agencies from having to explain the reasons underlying broad management decisions of concern to employees generally rather than to an employee in particular.

272. The exemption in paragraph (s) relating to transfers or promotions under section 53A of the Public Service Act concerns transfers or promotions of officers who complete courses of training for special positions. Transfers or promotions under section 53A are not subject to appeal.

273. The exemptions in paragraphs (t) and (w) of appointment decisions may be related to the principle that, as a general rule, recruitment decisions do not attract the principles of natural justice: *Cole v Cunningham* (1983) 49 ALR 123; *Attorney-General (NSW) v Quin* (1990) 93 ALR 1, 23-4, 42.

274. The Public Sector Union made a most helpful submission to the Council in respect of the exclusions presently contained in paragraphs (q), (r), (s), (t), (u) and (w).

Paragraph (q)

275. As to the exclusion in paragraph (q), the union suggested that the paragraph needed to be amended to allow the entitlement to reasons to apply where the decision in relation to personnel management affects adversely a particular person in a manner peculiar to that person. To the extent that the paragraph allows section 13 to apply where the decision relates to, and has regard to circumstances relating to, a particular person, the Council notes that the paragraph already goes much of the way towards accommodating this suggestion. The Council agrees with the union that a statement of reasons ought to be available in the circumstances outlined by it. As to the class of decisions which paragraph (q) presently

shields from section 13, the Council sees no reason why the paragraph should be maintained. If the decision is a strategic staffing decision that does not relate to a particular person and does not have regard to circumstances relating to a particular person, it is unlikely to be one in respect of which a particular person would have standing to seek a statement of reasons. In the Council's view, therefore, paragraph (q) could be removed on the basis that it would seem to be unnecessary to exclude the decisions concerned from the scope of the reasons requirement.

Paragraphs (r) and (s)

276. The number of requests for reasons made to the Public Service Board between 1982 and 1985 (a period when reasons could be requested for decisions relating to public service promotions and appeals) were:

1982-401
1983-579
1984-907
1985-294

(From the start of 1986, the Merit Protection and Review Agency took over the promotion appeal function from the Public Service Board. The MPRA did not supply statistics on requests in 1986 for statements of reasons. From the end of 1986, following passage of the *Public Service Legislation (Streamlining) Act 1986*, reasons for decisions in connection with promotions ceased to be available under section 13.)

277. Although any analysis of the figures must be approached with caution, it would seem that, by 1985, there had already been a decline in the number of requests for reasons for personnel related decision. This decline can perhaps be attributed to the improvements in procedures in relation to these decisions which occurred in the public service following decisions such as *Finch v Goldstein* (1981) 36 ALR 287. The ready availability of review and an awareness of the management benefits of a more open decision making process led to administrators paying more attention to matters such as procedural fairness and the giving of reasons for decisions as part of the decision making process. It was likely that this new attitude would bring with it a reduced demand for statements of reasons.

278. The costs to agencies in preparing section 13 statements for promotion and other personnel decisions must be weighed against the benefits flowing to management from a statements of reasons provision. Dr Peter Wilenski, then Chairman of the Public Service Board, said in an address to departmental heads at an administrative law seminar in 1984:

> the requirement to provide, or to be able to provide a statement of reasons for an appeal decision provides encouragement to the [selection] committees to approach their task in an ordered and structured fashion, causing them to focus on the issues that really should be taken into account when making such decisions. The personnel management benefit in an unsuccessful applicant being aware of the reasons for his or her non selection also has to be weighed on the positive side of the scale when considering whether it is desirable for those taking selection decisions to have to be able to substantiate them.

279. In a letter dated 19 October 1984 which was sent to the Council in response to a Council Issues Paper on the ADJR Act, the acting Chairman of the Public Service Board said that 'the Act's application to areas of administrative decision making for which [the Board] has responsibility is not incompatible with, and in the long term must surely enhance efficiency, economy and equity in administration'.

280. The Public Sector Union argued in its submission in connection with the present report that the 'workload' justification for paragraphs (r) and (s) was very thin and that they ought to be removed from Schedule 2. The union expressed agreement with the point made in the Council's discussion paper that the fact that personnel decisions in the public sector have a legislative basis places them in a significantly different position from personnel decisions in the private sector. The public service legislation enshrines principles of a career service with open competition, merit recruitment and advancement, even handed treatment in terms and conditions of staff, equal employment opportunity, etc. The fact that the significant terms of employment are fixed by statute has the result that greater scope exists in the public sector than in the private sector for action to be taken which is not in accordance with the statutory provisions and is thereby unlawful.

281. The union also said that the legislative basis of public service employment was in itself a reason in principle for the application of administrative law standards, which apply generally to the exercise of statutory authority. Furthermore, said the union, the merit principle and security of tenure were essential elements of proper government administration. To ensure that public servants performed their role properly and fearlessly to the advantage of government administration, it was important that statutory protections of the merit principle and security of tenure 'not be seen as clogs on the efficient discharge of governmental functions, but as indispensable to the performance of those functions'.

282. One of the curious features of the exclusions of promotion and transfer decisions that are effected by paragraphs (r) and (s) is that, under the selection committee process that now operates in the public sector for the filling of positions, full documentation is given for the promotion or transfer decision that is made, and the selection committee is required to give reasons for its advice to the Secretary or delegate. Furthermore, both the selection committee report and referee comments, in so far as they concern a particular officer, are normally made available to that officer upon request. In these circumstances, it is difficult to justify why section 13 should not apply. The submission of the Department of Foreign Affairs and Trade conceded as much when it said that 'reasons for decisions in personnel matters are readily available to staff on request, should they be interested in them'.

283. It must also be borne in mind, as the Public Sector Union pointed out in its submission, that section 13A has the effect that a statement of reasons for a decision referred to in paragraph (r) or (s) is not required to include information relating to the personal affairs of a person that was supplied in confidence. Accordingly, an obligation to provide reasons would not necessarily impinge on the privacy of others or compromise information supplied in confidence.

284. Having regard to the special nature of public service employment as discussed above and to the considerations raised by the Public Sector Union, the Council has reached the view that paragraphs (r) and (s) should no longer provide a basis for exemption from section 13.

Paragraph (t)

285. The fact that appointment and engagement decisions (paragraph (t)) do not normally attract the principles of natural justice might be seen as a reason why they ought to be excluded from the statements of reasons requirement in section 13.

286. On the other hand, appointments in the Commonwealth public sector stand on a different footing from appointments in the private sector. In the public sector legislative support can be found for principles of open competition and merit recruitment. Furthermore, the Ombudsman has drawn to the attention of the Council the fact that appointment decisions in the public sector attract a considerable number of complaints to his office from disappointed applicants. The nature of the complaints tends to be that no explanation was provided for the particular appointment decision.

287. Although the principles of natural justice would not ordinarily apply in relation to a decision relating to the making of an appointment, it cannot be said that judicial review would not be available in all circumstances. Having regard to this consideration and to the considerations raised by the Ombudsman, the Council considers that paragraph (t) should no longer provide a basis for an exemption from section 13.

Paragraph (w)

288. Decisions relating to the making of appointments of departmental secretaries present little scope for judicial review, both because of the nature of these positions and because of the circumstances in which appointments are made. If judicial review is for all practical purposes unavailable and if consistency is to be maintained between the right to obtain review and the right to a statement of reasons, decisions relating to the making of appointments of departmental secretaries should be excluded from the ADJR Act by an amendment of Schedule 1.

289. The Public Service Act makes provision for the termination of appointment both of departmental secretaries who hold fixed term appointments and departmental secretaries who, on their appointment, were officers of the public service. In both cases the person concerned becomes an unattached Secretary and may be redeployed.

290. On the one hand, it can be argued that, on natural justice grounds, a Secretary aggrieved by a decision relating to the termination of his or her appointment as Secretary should have the right to obtain a statement of reasons for the decision, should he or she wish to do so. On the other hand, it can be argued that the concept of tenure so far as departmental secretaries are concerned is today not relevant. Appointments are made by the Cabinet and movements of secretaries between departments and the placing of incumbents on the unattached list are not uncommon occurrences. It can be said that the holding of a position of Secretary of a Department is not very different from the holding of a position at pleasure.

291. The Council accepts the latter view. In *Coutts v Commonwealth* (1985) 157 CLR 91, 105 Justice Brennan described a power to dismiss at pleasure as a power that 'may be exercised at any time and for any reason, or for no reason or for a mistaken reason'. This suggests that the scope for review of such a power is minimal. If, as with appointment decisions, judicial review is virtually unavailable, the consequence ought to be that decisions terminating the appointments of departmental secretaries should be excluded from the ADJR Act by an appropriate amendment of Schedule 1.

Recommendation 22: Decisions relating to the making or terminating of appointments of departmental secretaries
Schedule 1 to the ADJR Act ought to be amended to include decisions relating to the making or terminating of appointments of Secretaries under the *Public Service Act 1922*.

Industrial decisions in the public sector (paragraph (u))

292. It would seem that decisions in connection with the prevention or settlement of industrial disputes in respect of the Australian Public Service or other Commonwealth Services are largely excluded from the scope of the ADJR Act by paragraph (a) of Schedule 1. In Report No 32 the Council recommended the continued exclusion of decisions covered by that paragraph. To this extent, therefore, paragraph (u) of Schedule 2 would appear to be unnecessary.

293. The Public Sector Union in its submission expressed concern about the additional reach of paragraph (u) to 'decisions . . . otherwise relating to industrial matters'. It said that matters that may now be regarded as industrial matters cover matters that may be of direct concern to an individual employee. In these cases, the union considered that the employee ought to be entitled to a statement of reasons.

294. The Council agrees with this point. To the extent that paragraph (u) deals with a decision affecting the rights or interests of a particular employee, a statement of reasons ought to be available.

Decisions to engage staff or to terminate their engagement under the Members of Parliament (Staff Act (paragraph (y))

295. The *Members of Parliament* (*Staff) Act 1984* provides for the employment of consultants and staff by Ministers and Senators and Members of the House of Representatives. The Act provides for automatic termination of the employment of consultants and staff in the event of the employer ceasing to hold office. It also contains provisions for termination of employment at will.

296. The Council considers that, given the personal nature of the employment and the provision made in the Act for termination of employment at will, both engagement decisions under the Act and decisions terminating engagements ought not to come within the scope of the ADJR Act.

Recommendation 23: Decisions to engage staff or to terminate their engagement under the Members of Parliament (Staff) Act
Schedule 1 to the ADJR Act ought to be amended to include decisions engaging consultants or staff under the *Members of Parliament (Staff) Act 1984* and decisions terminating their engagement.

Decisions relating to promotions, transfers, etc. of members of the Australian Federal Police (paragraph (z))

297. For the reasons given above concerning the classes of decisions referred to in paragraphs (r) and (s), the Council considers that paragraph (z) should no longer provide a basis for exemption from section 13.

Determinations under section 26E of Australian Federal Police Act (paragraph (za))

298. Section 26E was inserted in the *Australian Federal Police Act in 1989*. It provides for the making of determinations determining the appointment of commissioned police officers, non-commissioned police officers and staff members. In the case of commissioned police officers, a determination is required to be made by the Governor-General. In other cases, a determination is made by the Commissioner of Police. Subsection 26E(3) specifies certain grounds upon which a determination may not be made.

299. In the Council's view, paragraph (za) should not provide a basis for exemption from section 13. It is apparent that the power to issue a determination is not at large, since section 26E specifies some circumstances which are not to provide the basis for the exercise of power. Furthermore, any determination will have a substantial effect on the interests of the person in respect of whom it is issued.

CHAPTER 6

SCHEDULE 1 DECISIONS, NON-STATUTORY DECISIONS AND GOVERNOR-GENERAL DECISIONS

300. Report No. 32 considered that some classes of decisions should be excluded from review under the Act by means of Schedule 1. Those classes of decisions are:

- decisions of persons holding office under the *Industrial Relations Act 1988*;
- decisions under the *Coal Industry Act 1946*, other than decisions of the Joint Coal Board;
- decisions of the National Companies and Securities Commission (since replaced by the Australian Securities Commission);
- decisions of the Ministerial Council for Companies and Securities;
- decisions of a magistrate of a State or Territory made in proceedings under the *Extradition Act 1988*;
- decision of magistrates made in committal proceedings for offences against Commonwealth laws.

301. The exclusion of these classes of decisions from review under the Act would carry with it their exclusion from the statements of reasons requirement.

302. Report No. 32 also proposed that some classes of decisions that are presently excluded from the scope of the Act by Schedule 1 should no longer be so excluded. The issue that needs to be addressed in the present report is whether or not the proposed inclusion of those classes of decisions within the scope of review should also involve their inclusion within the scope of section 13.

Decisions proposed by the Council for removal from Schedule 1

Security and intelligence decisions

303. In its submission, the Department of the Prime Minister and Cabinet said that it endorsed the view that, in the event of decisions of the intelligence and security agencies being subject to the provisions of the Act, it was vital to ensure that requests for statements of reasons did not provide an avenue to force the disclosure of information which would otherwise be protected from release. The Department expressed agreement with the approach of adopting in the ADJR Act relevant provisions of the FOI Act designed to protect particular categories of information.

304. The Department went on to say, however, that it had misgivings about exposure of the intelligence and security agencies to statements of reasons when it was 'highly probable that the agencies would almost invariably be able to legitimately claim exemption from the requirement'. The Department considered that a process of going through the motions of dealing with a request for a statement of reasons when national security considerations would prevent such a statement being given was not cost effective.

305. The Council is of the view that, if security and intelligence decisions were no longer to be excluded from review under the ADJR Act by paragraph (d) of Schedule 1, requests for statements of reasons in respect of those decisions would be unlikely to be numerous. The nature of security and intelligence operations means that very few people become aware of

decisions that are taken in the area. The cost-effectiveness issue raised by the Department of the Prime Minister and Cabinet is therefore unlikely to be a major issue. Certainly, if a request for a statement of reasons were to be made, the mechanism for the giving of a certificate by the Attorney-General under section 14 would be sufficient to protect disclosure of information that may prejudice the security of Australia. Prompting recourse to the very mechanism that, from the inception of the ADJR Act, was in place to protect sensitive information from disclosure, can hardly be objected to on the grounds of cost.

306. The Council considers that an exclusion from the statements of reasons requirement does not need to be maintained in respect of decisions presently referred to in paragraphs (d) and (da) of Schedule 1.

Taxation decisions

307. Paragraph (e) of Schedule 1 relates to taxation assessment decisions and related decisions concerning assessments or calculations of tax or duty under various acts specified in the paragraph. Paragraph (g) relates to decisions concerning tax clearance certificates for income tax purposes.

308. Decisions concerning income tax are separately considered below. So far as decisions under the other specified taxation or duty Acts are concerned, the Council sees no reason why they should not be subject to the obligation to provide reasons on request. The main reason why assessment decisions have not been exposed to the reasons entitlement would appear to be the workload that the entitlement would impose on decision makers. However, to the extent that workload considerations require qualification of the principle that the scope of the entitlement should be coextensive with the scope of review under the ADJR Act, the Council does not consider that, in areas apart from the income tax area, those considerations come into play.

Decisions relating to income tax

309. Both taxation assessment decisions in the income tax area and decisions concerning tax clearance certificates are decisions that are subject to the objection and appeal provisions of the Income Tax Assessment Act. Although review by the AAT is available, it is only available upon the disallowance of an objection. Even where an objection decision is made, that decision is not subject to the requirement in section 28 of the AAT Act that reasons be supplied on request. Objection decisions also used not to be subject to the requirements of section 37 of the AAT Act relating to the giving of a statement of reasons upon lodgment by the applicant of an application for review. However, since 1 July 1988, section 37 of the AAT Act applies. Thus, a statement of reasons for the objection decision can now be obtained, although it will depend on payment by the taxpayer of the $300 fee payable on the lodgment with the AAT of an application for review.

310. The question whether a statement of reasons ought to be able to be obtained upon the making of a taxation assessment is a vexed one. Statements have been made in the authorities which suggest that the Commissioner of Taxation should, in appropriate cases, give particulars to a taxpayer of the basis of the assessment so that the taxpayer may determine whether he will object to the assessment and subsequently appeal. However, these views have been expressed as statements of what the Commissioner should do as a matter of fairness rather than as a matter of legal obligation: *Spence v Federal Commissioner of Taxation* (1969) 121 CLR 273, 282; *McClelland v Federal Commissioner of Taxation* (1968) 118 CLR 353, 361; *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365, 384. In *Bailey v Federal Commissioner of Taxation* (1977) 136 CLR 214, 221 Justice Mason ,said:

> Indeed, there is very much to be said for the view that fairness to the taxpayer demands that the Commissioner should be compelled to give particulars of his assessment when it issues so that the taxpayer is adequately informed as to the manner in which the assessment has been arrived at and may then determine whether he will object to the assessment and subsequently appeal. But that is a matter for the legislature.

311. In Report No. 17, *Review of Taxation Decisions by Boards of Review*, the Council referred to a submission from the Taxation Institute of Australia in which the Institute said that reasons for decisions by the Commissioner should be given not at the time the matter is listed before the appeal tribunal but at the very time the assessment is made (para 134). However, in that report, the Council said that it did not believe that the requirements of section 28 of the AAT Act would be workable in a taxation jurisdiction of the AAT (para 171). The Council said that its conclusion was based on the expected high volume of cases and the potentially heavy burden a large number of requests for reasons would place on the Australian Taxation Office. Nonetheless, the Council said that it was aware of the benefits which would be lost by the exclusion of section 28 in taxation matters. It went on to say that, as the provision of a full statement of reasons at an early stage may often obviate the need for subsequent review proceedings, it intended to consider in the future the circumstances in which section 28 could be given operation.

312. In connection with the present report, the Taxation Institute of Australia made a further submission in which it said that, in its view, the argument that, on workload grounds, a statement of reasons should not be available at the time that a taxation assessment is made was, as a result of the introduction of self assessment, no longer valid:

> Under self assessment, the Commissioner is no longer required to form an opinion as to the taxable income of a taxpayer in each case. So in the vast majority of cases there is simply no occasion for a request for reasons to arise. However, in cases where the Commissioner makes an actual decision, as opposed to circumstances in which the Commissioner simply accepts, under s.169A(1) of the *Income Tax Assessment Act 1936*, the statements in a taxpayer's return (ie passive assessment decisions), there is still a case for requiring a statement of reasons to be provided. The arguments based on administrative burden would no longer apply.

313. The change to the traditional assessment system to which the submission of the Taxation Institute draws attention is of considerable importance. Under the full self assessment system for companies and superannuation funds which has applied since the 1989-90 financial year, the taxpayer's return is itself deemed to be an assessment (s.166A) and the Commissioner does not issue a separate assessment. Section 169A provides for a limited self assessment system for individuals and partnerships. Although under this system the Commissioner may accept the statements in the taxpayer's return, the step of making an assessment is still taken by the Commissioner.

314. It would seem to the Council that, upon the implementation of full self assessment in the income taxation area, it would not be appropriate to maintain an exclusion from statements of reasons for assessment decisions. Indeed, such an exclusion would be unnecessary since in most cases under full self assessment an assessment decision will not in fact be made. As yet, however, full self assessment has not been completely implemented in the income taxation area. It is therefore appropriate to consider what the position should be concerning the provision of statements of reasons pending its complete implementation.

315. As mentioned above, workload considerations have, to date, provided the principal reason why assessment decisions have not been exposed to the reasons entitlement. The

Council has been informed by the Australian Taxation Office that, during the year which ended on 30 June 1989, ten million notices of assessment were issued. If effect were to be given to the principle that the entitlement to reasons should be aligned with the entitlement to seek review given by the ADJR Act, an argument based on workload would not be relevant to the issue whether reasons ought to be available. In the present case, however, the potential volume of work that may be entailed has led the Council to the view that, until full self assessment is implemented, the Council should take the pragmatic approach that an exclusion from reasons is appropriate. Another consideration that is relevant to the giving of statements of reasons for assessment decisions is the fact that under the present partial self assessment arrangement, the information upon which the assessment is made is, in most cases, the information provided by the taxpayer in his or her return. In these circumstances, access to a statement of reasons is unlikely to prove to be particularly profitable for the taxpayer.

316. Irrespective of the view that may be taken concerning assessment decisions, the Council considers that statements of reasons ought to be available in relation to the next stage in the Australian Taxation Office decision making process, namely, the making of a decision on any objection lodged by a taxpayer. At this point, where the taxpayer must decide whether to appeal to the AAT, it is reasonable that the taxpayer .be entitled to a statement of reasons for the objection decision. The taxpayer should not be put in the position that presently applies of having to pay the $300 AAT application fee before a statement of reasons is given.

317. The Council notes that, following the transfer from the Commonwealth to the Australian Capital Territory of taxation responsibilities in the Territory, the ACT legislation in stamp duty and other taxation areas enables taxpayers to obtain a statement of reasons under the ACT AAT Act for objection decisions made by the ACT Revenue Office.

318. The Council also notes the qualified support given by the Commissioner of Taxation to the proposal that decisions on objections be subject to section 13. The Australian Taxation Office in its submission said that, while it remained strongly opposed to the inclusion within the ambit of the ADJR Act of decisions on objections and of tax clearance decisions, it would not oppose those decisions being subject to section 13 if the recommendations of the Council's Report No. 32 were to be put into effect.

319. In order to enable statements of reasons to be available in relation to taxation objection decisions, the appropriate course would appear to be to amend subsection 14ZD(2) of the *Taxation Administration Act 1953* to enable section 28 of the AAT Act to apply.

320. Paragraph (e) of Schedule 1 is expressed in broad terms. It extends to cover 'decisions . . . forming part of the process of making, or leading up to the making of, assessments or calculations of tax or duty' under the tax Acts specified in the paragraph. The fact that the paragraph thus covers decisions that are not of a substantive character was noted by the High Court in its decision in *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11, which was mentioned earlier in this report. The view of Chief Justice Mason, with whom Justices Brennan and Deane agreed, was that these non-substantive decisions were included within paragraph (e) for more abundant caution (p. 24). Clearly, however, the effect of the High Court's decision in that case is that the exclusion of these decisions from the scope of section 13 is unnecessary, the decisions not being subject to the Act in any event.

321. So far as decisions calculating tax or duty or decisions amending or refusing to amend assessments or calculations are concerned, the Council sees no reason why they should not be subject to the obligation to provide reasons on request. Workload considerations would not appear to be relevant in these cases.

322. Since the Council's Report No. 32 was completed, a new paragraph relating to taxation has been inserted in Schedule 1. The new paragraph is paragraph (f) which excludes from the ambit of the Act decisions of the Commissioner of Taxation under subsection 3E(1) of the *Taxation Administration Act 1953*. Subsection 3E(1) empowers the Commissioner to disclose information acquired by the Commissioner under the provisions of a tax law to an authorised law enforcement agency officer if the Commissioner is satisfied that the information is relevant either to establishing whether a serious offence has been committed or to the making of a proceeds of crime order.

323. Since a 'decision of the Commissioner under subsection 3E(1) would be amenable to review in the Federal Court under the prerogative writs, the Council considers that, consistently with the approach adopted in Report No. 32, paragraph (f) ought to be repealed. As to the question whether the decisions to which it refers ought to be excluded from the statements of reasons requirement, the Council further considers that they ought not to be excluded, since section 13A of the ADJR Act, as proposed in this report to be emended, would provide any necessary protection for sensitive information relevant to the decisions. They are decisions of a similar nature to decisions referred to in paragraphs (e) and (f) of Schedule 2.

Recommendation 24: Certain taxation decisions

(1) Subsection 14ZD(2) of the *Taxation Administration Act 1953* ought to be amended to omit the reference to section 28 of the *Administrative Appeals Tribunal Act 1975*.

(2) Subsection 13 (11) of the ADJR Act ought to be amended to exclude from the definition of decision to which section 13 applies a decision making an assessment under the *Income Tax Assessment Act 1936*.

(3) The exclusion from the definition of decision to which section 13 applies set out in sub-recommendation (2) ought to be removed upon the implementation of full self assessment under the Income Tax Assessment Act.

Decisions under the Foreign Acquisitions and Takeovers Act and certain decisions under the Banking (Foreign Exchange) Regulations

324. As previously discussed, recommendation 21 would appear to make satisfactory provision for these decisions.

Decisions of the National Labour Consultative Council

325. As was said by the Council in Report No 32, the National Labour Consultative Council is a consultative body whose Act does not provide for it to make decisions as such. Such decisions as it does make would not seem to be of a kind which would confer standing on a particular person. Accordingly, the Council does not consider that an exclusion from the statements of reasons requirement needs to be maintained in respect of these decisions.

Decisions under the Defence Force Discipline Act

326. The *Defence Force Discipline Act 1982* provides for its own code of investigation of service offences, trial of charges, appeals and reviews. Hearings of proceedings before a court martial or a Defence Force magistrate are required to be in public and, in such proceedings, the accused person is, to the extent that the exigencies of service permit, entitled to be legally represented.

327. A major question that arises in this area is whether many of the decisions provided for in the Act can properly be described as decisions 'of an administrative character'. In the discussion paper, it was suggested that there are strong grounds for arguing that they do not meet that description. In *Re Tracey; ex parte Ryan* (1988) 166 CLR 518 Mason CJ, Wilson and Dawson JJ said that, in trying offences under the Defence Force Discipline Act, a service tribunal had 'practically all the characteristics of a court exercising judicial power' (p. 537). They further said that no relevant distinction could be drawn 'between the power exercised by a service tribunal and the judicial power exercised by a court' (p. 537). If this is so, the discussion paper said that it would seem to follow that the most significant of the decisions made under the Act are not decisions of an administrative character but are decisions of a judicial character. The further consequence would be that there would be no need for them to be specifically excluded from the ADJR Act as a class.

328. The Department of Defence in its submission disagreed with this approach. It said that, applying the decision in *Re Tracey*, the only decisions under the Defence Force Discipline Act that were to be regarded as of a judicial character were decisions as to criminal liability and punishment made by a Service Tribunal. The Department said that all other decisions that were provided for under the Act were decisions of an administrative character. Amongst these decisions were decisions to investigate a service offence, to arrest a defence member, to search the person or property of a defence member, to give a caution, to take finger prints or other evidence from a person in custody, to require, a person in custody to submit to a medical examination or to supply a specimen, to retain a person in custody, to charge a person with a service offence, to suspend a defence member from duty, to refer a charge to a convening authority, to convene a trial by court martial or Defence Force magistrate and a decision made in the course of review of a conviction and punishment imposed by a service tribunal.

329. It seems to the Council that, on the authority of the High Court's decision in Australian Broadcasting Tribunal v Bond, many of these decisions may not be final or operative decisions, or may not be substantive determinations, such as to bring them within the scope of the ADJR Act. On the other hand, to the extent that decisions under the Defence Force Discipline Act are decisions of an administrative character and are reviewable so that section 13 of the ADJR Act is attracted, the Council does not consider that section 13 should be prevented from applying.

330. The Council notes that the Department of Defence in its submission expressed opposition to any proposal to subject the decisions concerned to the obligation to provide reasons on request. The Department said that to subject administrative decisions made under the Defence Force Discipline Act to the statements of reasons requirement in the ADJR Act would introduce unnecessary complexity into the operation of the former Act and prejudice its effectiveness. It would not result, said the Department, in the type of disciplinary system thought to be appropriate for the Defence Force.

331. While the Council accepts that the code of discipline applying to members of the Defence Force subjects them to laws, regulations and rules over and above those which are imposed by the civil law, it does not accept the view that the mere availability of a facility to seek a statement of reasons in a case where the decision is administrative in character and is of a substantive nature, would necessarily be at odds with the discipline code. Accordingly, the Council does not consider that an exclusion from the statements of reasons requirement

needs to be maintained in respect of decisions presently covered by paragraph (o) of Schedule 1.

Decisions under the Customs Act to require securities in respect of anti-dumping duty that may be payable

332. Certain information that may be relied on in connection with the making of these decisions may be sensitive. But sections 13A and 14 provide appropriate protection from disclosure of such information. The Council does not consider that an exclusion from the statements of reasons requirement needs to be put in place in respect of these decisions.

Decisions concerning electoral redistributions

333. The Council considers that there is no need for the decisions referred to in paragraph (q) of Schedule 1 to be exempted from the statements of reasons requirement. Determinations under section 48 of the Commonwealth *Electoral Act 1918* are required by section 49 to be included in a certificate which is laid before each House of the Parliament. Accordingly, they would be exempted from the reasons requirement if the amendment of subsection 13(11) of the ADJR Act recommended in recommendation 19 were to be made.

334. Part IV of the Commonwealth Electoral Act is concerned with electoral redistributions. The Act provides for redistribution committees and augmented electoral commissions to give reasons for their decisions. Accordingly, section 25D of the Acts *Interpretation Act 1901* will apply, requiring the findings on material questions of fact to be set out and requiring the evidence on which the findings were based to be referred to. The further consequence is that section 13 of the ADJR Act will not apply to the decisions because of the operation of paragraph 13(11)(b).

335. Part IV of the Commonwealth Electoral Act also provides for the making of certain other decisions. The decision maker in these cases is either the Electoral Commissioner or the Chairman of the Electoral Commission. There does not appear to be anything about these decisions which suggests that they ought to be exempt from the statements of reasons requirement.

Surrender decisions of the Attorney-General under the Extradition Act

336. In Report No. 32 the Council recommended that decisions of a magistrate made in proceedings under the *Extradition Act 1988* ought to be excluded from the ambit of the ADJR Act. It considered, however, that surrender decisions of the Attorney-General ought not to be excluded from the ambit of the Act. The question that now needs to be considered is whether the latter decisions ought to be subject to the statements of reasons requirement.

337. The Council does not consider that there are compelling reasons why they should be specifically exempted. Section 50 of the Extradition Act gives communications that take place between officers of the Attorney-General's Department and officers of an extradition country the same protection as attaches to communications passing between solicitor and client. Accordingly, privilege such as would attract a certificate under section 14 of the ADJR Act may attach to certain information relevant to the decisions. But section 14 is specifically intended to be available to deal with this kind of situation.

Statutory decisions of the Governor-General

338. Report No 32 of the Council recommended that the definition of decision to which the ADJR Act applies ought to be amended to remove the present exclusion of statutory decisions of the Governor-General. The question that now needs to be considered is whether or not those decisions should be exposed to the statement of reasons requirement. As a general matter, there does not appear to be a compelling ground for their exclusion as a class. The issue was addressed by the High Court in *FAI Insurances v Winneke* (1982) 151 CLR 342, which concerned the requirements of the Administrative Law Act of Victoria. Justice Wilson said (p. 404):

> In the fourth place, it is said that the obligation placed on a tribunal to furnish any person affected by a decision with a statement of its reasons for the decision tends against a conclusion that the Governor in Council could be placed in such a position. I agree that at first sight it does seem surprising that such a body should be placed under such an obligation, but on reflection the surprise flows from the assumption that the Governor himself would be making the decision of which the reasons are to be given. The object is answered by the same considerations which I have discussed in these reasons in relation to the propriety or otherwise of placing the Governor in Council under a duty to be fair. When that obligation is placed in the administrative framework of the public service and the conventions of constitutional practice, there is no plausible reason why the Minister responsible for making the recommendation upon which is based the advice of the Executive Council should not disclose to the applicant the reasons for that recommendation.

339. The Attorney-General's Department in its submission drew attention to the fact that, as the Council recognised in Report No 32, some decisions of the Governor-General are unlikely to be justiciable. In these circumstances, the Department queried whether they ought to be exposed to section 13. The Department further pointed out that what Justice Wilson said in the passage quoted above is not that the reasons for the decision could be given but that the reasons for the recommendation of the Minister upon which the decision was based could be given.

340. In relation to the first of these points, the Council does not accept that, merely because certain statutory decisions of the Governor-General may be non justiciable, all such decisions should be beyond the reach of section 13. While recommendations 17 and 18 of this report proceed on the basis that decisions which can be identified with some assurance as non justiciable ought to be excluded from the scope of the Act as a whole, statutory decisions of the Governor-General as a class will comprehend some decisions that are non-justiciable but many that are justiciable. In these circumstances, the facility for obtaining a statement of reasons and the facility in section 14 of the Act for the giving by the Attorney-General of public interest certificates preventing the disclosure of certain information can be expected to be of importance to an ultimate conclusion by the Federal Court on the justiciability issue. What the statement of reasons reveals or what is revealed by reasons given under section 14 for not including certain information in the statement of reasons will determine the justiciability issue to a very significant extent.

341. The conclusion of the Council is that the possibility that some decisions of the Governor-General are non justiciable, far from militating against their exposure to section 13, provides a positive reason why they should be exposed to that section.

342. As to the second point made by the Attorney-General's Department, the Council agrees that it would be appropriate for the responsible Minister rather than the Governor-General to be regarded as the person who made the relevant decision.

Recommendation 25: Statutory decisions of the Governor-General
The ADJR Act ought to be amended to provide that, for the purposes of the application of section 13 to a decision of the Governor-General, the Minister responsible for the advice tendered to the Governor-General is to be deemed to be the person who made the decision.

Decisions made by officers of Commonwealth under non-statutory schemes

343. Report No 32 recommended extension of the scope of the ADJR Act into one area of non-statutory decision making. That area is where decisions are made by Commonwealth officers under non-statutory schemes or programs the funds for which are authorised by appropriations made by the Parliament specifically for the schemes or programs.

344. Such schemes or programs operate in many areas of Commonwealth administration. They are perhaps most prevalent in the employment and job creation areas. Submissions made to the Council prior to the preparation of Report No 32 indicated that individuals affected by decisions 'under non statutory schemes or programs occasionally have serious concerns about their administration.

345. If the decisions are to be brought within the scope of the Act, there does not appear to be any case for their exclusion as a class from the statements of reasons requirement.

Other non-statutory decisions

346. The Commonwealth Ombudsman in his submission drew attention to problems that arise from time to time concerning the absence of an entitlement to reasons where a decision has been made in the exercise of executive power. In the Ombudsman's experience, difficulties tended to arise particularly in the context of government tendering processes. The Ombudsman instanced a case where a firm had complained to the Ombudsman because it had been unable to get from the Department of Administrative Services an explanation that satisfied it concerning the reasons why it had not been granted a particular contract.

347. The Ombudsman argued that it was in the interests of the Commonwealth for tenderers to have a clear understanding of why they had not been successful in the awarding of contracts. The Ombudsman said that it 'should discourage unsuitable companies from tendering again, should dispel any fears of favouritism or partiality, and it may encourage able companies to make their tenders more attractive in future, thus enhancing competition in provision of goods and services to the Commonwealth'.

348. The thrust of the submissions of the Department of Administrative Services and of Australia Post was contrary to this approach. The Department of Administrative Services said:

> There is a strong case for competitively commercial activities in the Commonwealth being, as far as possible, on a level playing field with their private sector counterparts. This policy is reflected in Government policy on purchasing reform and the commercial approach required of this Department, and more generally in the requirement to make the achievement of value for money the main objective in Commonwealth purchasing.

It is also our view that consideration should be given to removing the anomaly whereby the tendering and contracting decisions of some agencies are subject to the Act because their

power to contract is conferred by statute. These agencies should also be exempt from such requirements.

349. The Council agrees with the views expressed by the Ombudsman. The Council further considers that the views expressed by the Department of Administrative Services overlook the fact that in the public sector there is a public interest to be served in ensuring that decisions are properly made in accordance with law and that the executive government is accountable to the community for those decisions.

350. The Council does not regard it as an anomaly that the tendering and contracting decisions of some statutory authorities are subject to the ADJR Act. If Parliament has legislated to create a statutory authority, it is appropriate that it be subject to the legal controls imported by the manner of its creation.

351. On the other hand, the Council does not consider that in this report it should make any recommendations directed to the application of section 13 of the ADJR Act to non-statutory contracting and tendering decisions. In Report No 32 the Council said that it proposed to embark on a discrete study of Commonwealth contracting and tendering processes. The question of the availability of statements of reasons will be taken up in that study.

CHAPTER 7

ADDENDUM CONCERNING COUNCIL REPORT NUMBER 32

352. In the introduction to this report the Council mentioned that the government had decided that it would not respond to the Council's Report No 32, dealing with the ambit of the ADJR Act for judicial review purposes, until the Council had completed its present report on statements of reasons. Since the government will now be looking to reach decisions on the full package of proposals concerning the Act, as set out in Report No 32 and the present report, it is appropriate that this chapter complete the picture by taking account of any developments in judicial review that have taken place since Report No 32 was completed and that might require some adjustment to the recommendations in that report.

353. One such development is the decision of the High Court that was handed down on 26 July 1990 in *Australian Broadcasting Tribunal v Bond* (1990) 94 ALR 11. The implications of the High Court's decision, in limiting the scope of the concept of a reviewable decision for the purposes of the ADJR Act, were discussed in chapter 2. The High Court also considered the scope under section 6 of the Act for the review of conduct related to the making of decisions. The implications of that aspect of the High Court's decision now needs to be examined.

Reviewability of conduct

354. In Report No 32, the Council recommended an amendment of section 6. The amendment proposed a small expansion of the section to enable applications for review to be made in respect of conduct engaged in for the purpose of the making of a decision to which the Act applies, whether the decision was to be made by the person engaging in the conduct or by another person. The purpose of the recommendation was to enhance the reviewability of reports and recommendations which affect the rights, obligations or legitimate expectations of individuals. The recommendation assumed that the making of a report or recommendation could be regarded as engaging in conduct for the purposes of section 6.

355. Subsection 3(3) of the Act presently enables certain reports or recommendations to be reviewed as if they were decisions. However, the effect of the case law is that the subsection only applies where provision is made by an enactment for the making of a report or recommendation as a condition precedent to the making of a decision by a decision maker. Reports or recommendations which do not fall into this category are generally beyond the scope of review under the Act.

356. Before the decision of the High Court in *Australian Broadcasting Tribunal v Bond*, little consideration had been given by the courts to the meaning of section 6. In *Australian Broadcasting Tribunal v Bond*, the High Court said (p. 27):

> However, once it is accepted that 'decision' connotes a determination for which provision is made by or under a statute, one that generally is substantive, final and operative, the place of 'conduct' in the statutory scheme of things becomes reasonably clear. In its setting in s.6 the word 'conduct' points to action taken, rather than a decision made, for the purpose of making a reviewable decision. In other words, the concept of conduct

> looks to the way in which the proceedings have been conducted, the conduct of the proceedings, rather than decisions made along the way with a view to the making of a final determination. Thus, conduct is essentially procedural and not substantive in character.

357. If, as the High Court said in this case, section 6 is concerned with procedural matters, a difficulty arises with the recommendation concerning the section made by the Council in Report No 32 in so far as the recommendation was intended to enhance the reviewability of reports and recommendations. A likely result of the *ABT Case* would appear to be that, while the procedure of a recommendatory body would be reviewable under section 6, the outcome of that procedure in terms of the report or recommendation made by the body would not be amenable to review. The Council would regard this as an unsatisfactory result. It may have been this unsatisfactory outcome which led Justice Davies to the view in the *Edelsten Case* discussed earlier (paras 40-46) that the action of the delegate of the Minister in referring the suspected case of excessive servicing to the Medical Services Committee of Inquiry was reviewable as conduct under section 6.

358. An illustration of the difficulty concerning the review of conduct which follows from *ABT v Bond* is provided by the circumstances of the Determination of Refugee Status Committee in the migration area and of the National Health and Medical Research Council in the health area.

359. The Determination of Refugee Status Committee makes recommendations to the Minister on whether persons claiming to be refugees should be recognised as such for migration purposes. The Committee has no statutory foundation. Recommendations made by it do not attract subsection 3(3) of the ADJR Act. While its processes may be reviewable as conduct under section 6 (see the discussion by Chief Justice Mason in *ABT v Bond* at p27 of the decision of the High Court in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 87 ALR 412), the effect of the *ABT Case* would appear to be that the ultimate recommendation made by it would not attract review under the Act. Only the decision of the Minister made on the recommendation would be open to challenge.

360. The outcome concerning the National Health and Medical Research Council is similar. 'Decisions' made by that body have the legal status of recommendations, with the determinative decisions made elsewhere. The Administrative Review Council's letter of advice to the Attorney-General of 6 December 1990 drew attention to the problems associated with seeking review of action taken by the National Health and Medical Research Council.

361. If, as would commonly be the case with the Determination of Refugee Status Committee and the National Health and Medical Research Council, the determinative decision maker merely 'rubber stamps' the recommendation made to him or her, such scope as might exist for an aggrieved person to seek review of the determinative decision may be of little avail. What the aggrieved person is interested in challenging is the flawed basis of the recommendation; it may be difficult to review the determinative decision on any of the grounds set out in the ADJR Act.

362. One option to deal with the problem would be to amend subsection 3(3) to deem the making of any report or recommendation before a decision is made to be the making of a decision. The difficulty with this approach is that it would expose all recommendations in the administrative process not only to review but also to reasons. Since the administrative

process often involves a chain of recommendations leading from a junior officer to a senior decision maker, the approach would lead to a considerable expansion both in the scope of review and in the scope of the reasons requirement. A similar proposal attracted considerable adverse comment when it was floated prior to the preparation by the Council of Report No 32 (see paras 399-408 of that report).

363. Another option would be to amend subsection 3(5). That subsection gives an expanded interpretation to the concept of engaging in conduct for the purposes of the Act. The proposed amendment would include the making of reports or recommendations within that concept. As amended, the subsection would read:

> (5) A reference in this Act to conduct engaged in for the purpose of the making of a decision includes a reference to the doing of any act or thing preparatory to the making of the decision, including the taking of evidence, the holding of an inquiry or investigation or the making of a report or recommendation.

364. This approach would have the effect of bringing within the scope of review under the Act a broader range of reports and recommendations than are presently covered by subsection 3(3) but would not expose them to the reasons requirement. The disadvantage of the approach from the point of view of potential applicants for review of the reports or recommendations is that they would not have an entitlement to a statement of reasons to assist them in formulating their review applications. A further difficulty with the proposed amendment is of a conceptual nature. That difficulty is that some reports or recommendations would be treated as decisions (by virtue of subsection 3(3)), while others would be treated as conduct. As a result, the careful distinction between decisions and conduct which the Chief Justice drew in *ABT v Bond* would to some extent be blurred.

365. On the other hand, the treatment of reports and recommendations in the two different ways is arguably warranted. It would generally be accepted that reports and recommendations provided for by legislation as a condition precedent to the making of a decision should themselves be treated as ultimate and determinative decisions for all purposes of the ADJR Act. In the case of reports and recommendations that do not have that status, however, it can be said that, while they should equally attract review, the nature of the administrative process makes it undesirable that an entitlement to reasons be available.

366. Although the Council recognises that acceptance of this position concerning reports and recommendations represents a qualification of the principle followed in this report that there ought to be an entitlement to reasons in cases where judicial review under the Act is available, the Council has on balance reached the view that the amendment of subsection 3(5) referred to above is appropriate. In essence, the Council has taken the pragmatic view that the proposed amendment represents the only satisfactory way of ensuring the amenability to review of reports and recommendations not covered by subsection 3(3).

367. The Council notes that, if the proposed amendment is made, it will enhance review of reports of Royal Commissioners (*cf Ross v Costigan* (1982) 41 ALR 319; *R v Collins; ex parse ACTU-Solo* (1976) 8 ALR 691). The exposure of their reports to judicial review under the ADJR Act is consistent with the position in other jurisdictions (see *Mahon v Air New Zealand* (1983) 50 ALR 193).

368. Should the amendment to subsection 3(5) be made, the question arises whether there is any need for the amendment of section 6 set out in recommendation 17 of Report No 32 to be implemented. The Council has concluded that there is such a need. Indeed, the

amendment proposed in recommendation 17 would seem to be necessary in order to carry into effect the intention of the proposed subsection 3(5) amendment.

369. The starting point for recommendation 17 of Report No 32 was *Gourgaud v Lawton* (1982) 42 ALR 117. It could be seen as standing in the way of review of conduct engaged in as part of a recommendatory process through its insistence that the conduct with which section 6 deals is conduct of the decision maker and not conduct of another person. That proposition was impliedly overruled by the High Court in *Chan's Case* when it said (87 ALR 412, 416):

> It matters not that the antecedent decision was not made by the person who makes the decision to which the Act applies . . .

370. While the Council favours this approach, it considers that the construction of subsection 6(1) which it involves strains the language of the subsection. Furthermore, the construction appears not to be consistent with paragraph 6(1)(c). That paragraph provides that one of the grounds of review of conduct is 'that the person who has engaged . . . in the conduct does not have jurisdiction to make the proposed decision'. In the Council's view, section 6 ought to be amended to overcome the difficulties of construction.

371. In recommendation 1(2) of Report No 32 the Council proposed that subsection 3(3) of the ADJR Act be amended by omitting the words 'in the exercise of a power under that enactment or under another law'. The purpose of the recommended amendment was to ensure that pre-decisional reports or recommendations provided for by an enactment were treated as decisions even though the subsequent decision was one made not under statute but under a non statutory scheme. This recommended amendment is not affected by anything referred to above and, in the view of the Council, continues to be appropriate.

Recommendation 26: Reports or recommendations to be treated as conduct
Subsection 3(5) ought to be amended to include a reference to the making of a report or recommendation in references in the Act to conduct engaged in for the purpose of the making of a decision.

The discretion of the Court to refuse relief

372. In recommendation 15 of Report No 32 the Council proposed that the ADJR Act be amended by provisions along the lines of the *Administrative Decisions (Judicial Review) Amendment Bill 1987*, subject to certain amendments being made to the Bill. As mentioned in the introduction to the present report, one of the major purposes of the Bill was to strengthen the hand of the Federal Court in cases where applications for review were made to it in relation to decisions or conduct of a tribunal, authority or person during the course of proceedings before the tribunal, authority or person.

373. The amendments proposed by the Bill were prompted by the events which surrounded the hearings of the Australian Broadcasting Tribunal into the granting of a third commercial television licence for Perth in which, during the course of the proceedings, 16 cases were decided by the Federal Court under the ADJR Act. The effect of the litigation was to delay the decision of the Tribunal on the Perth licence for some 12 months.

374. The Council considers that the recommendation made by it in Report No. 32 concerning the introduction into the ADJR Act of provisions along the lines of the *Administrative Decisions (Judicial Review) Amendment Bill 1987* remains appropriate. In the

light of the decision of the High Court in *Australian Broadcasting Tribunal v Bond*, however, the observation may be made that the scope for seeking review of certain decisions made in the course of proceedings before a tribunal like the Australian Broadcasting Tribunal may be somewhat reduced. Unless what is in issue is a procedural direction (as, eg, in *Swan Television and Radio Broadcasters Limited v Australian Broadcasting Tribunal* (1985) 61 ALR 319), so that section 6 of the ADJR Act could be relied upon, it may be that no decision could be identified such as would properly found an application for review. In this respect, the impetus for the proposed amendments contained in the Bill may have lost some force.

375. On the other hand, one of the further aims of the proposed amendments was to ensure that, where an applicant had an alternative avenue of review, such as the AAT or another review tribunal, that avenue of review was pursued. The importance of the proposed amendments in this respect would not appear to have diminished.

APPENDIX A

SUBMISSIONS

The following is a list of individuals, agencies and organisations who made submissions in response to the Council's discussion paper 'Review of the Administrative Decisions (Judicial Review) Act: Statements of Reasons' which was circulated for comment in January 1990.

Australian Customs Service
Australian Post
Mr W C R Bale QC, Solicitor General, Tasmania
Commissioner of Taxation
Commonwealth and Defence Force Ombudsman
Commonwealth Attorney-General's Department
Commonwealth Department of Administrative Services
Commonwealth Department of Community Services and Health
Commonwealth Department of Defence
Commonwealth Department of Foreign Affairs and Trade
Commonwealth Department of Immigration, Local Government and Ethnic Affairs
Commonwealth Department of Industrial Relations
Commonwealth Department of the Prime Minister and Cabinet
Commonwealth Department of Transport and Communications
Commonwealth Director of Public Prosecutions
Commonwealth Grants Commission
Mr L J Curtis
Customs Agents Institute of Australia
Mr J Doyle QC, Solicitor-General, South Australia
Human Rights and Equal Opportunity Commission
Law Institute of Victoria
Law Society of Australian Capital Territory
Law Society of New South Wales
Law Society of Western Australia
Legal Aid Commission of New South Wales
Patent Attorney's Professional Standards Board
Public Interest Advocacy Centre
Public Sector Union
Reserve Bank of Australia
Mr M B Smith
Taxation Institute of Australia
Victorian Bar Council

APPENDIX B

SECTION 13, AD(JR) ACT

13.(1) Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Court under section 5 in relation to the decision may, by notice in writing given to the person who made the decision, request him to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.

(2) Where such a request is made, the person who made the decision shall, subject to this section, as soon as practicable, and in any event within 28 days, after receiving the request, prepare the statement and furnish it to the person who made the request.

(3) Where a person to whom a request is made under sub-section (1) is of the opinion that the person who made the request was not entitled to make the request, the first-mentioned person may, within 28 days after receiving the request-

(a) give to the second-mentioned person notice in writing of his opinion; or
(b) apply to the Court under sub-section (4A) for an order declaring that the person who made the request was not entitled to make the request.

(4) Where a person gives a notice under sub-section (3), or applies to the Court under sub-section (4A), with respect to a request, the person is not required to comply with the request unless-

(a) the Court, on an application under sub-section (4A), declares that the person who made the request was entitled to make the request; or
(b) the person who gave the notice under sub-section (3) has applied to the Court under sub-section (4A) for an order declaring that the person who made the request was not entitled to make the request and the Court refuses that application,

and, in either of those cases, the person who gave the notice shall prepare the statement to which the request relates and furnish it to the person who made the request within 28 days after the decision of the Court.

(4A) The Court may, on the application of-

(a) a person to whom a request is made under sub-section (1); or
(b) a person who has received a notice under sub-section (3),

make an order declaring that the person who made the request concerned was, or was not, entitled to make the request.

(5) A person to whom a request for a statement in relation to a decision is made under sub-section (1) may refuse to prepare and furnish the statement if-

(a) in the case of a decision the terms of which were recorded in writing and set out in a document that was furnished to the person who made the request-the

request was not made on or before the twenty-eighth day after the day on which that document was so furnished; or

(b) in any other case-the request was not made within a reasonable time after the decision was made,

and in any such case the person to whom the request was made shall give to the person who made the request, within 14 days after receiving the request, notice in writing stating that the statement will not be furnished to him and giving the reason why the statement will not be so furnished.

(6) For the purposes of paragraph (5)(b), a request for a statement in relation to a decision shall be deemed to have been made within a reasonable time after the decision was made if the Court, on application by the person who made the request, declares that the request was made within a reasonable time after the decision was made.

(7) If the Court, upon application for an order under this sub-section made to it by a person to whom a statement has been furnished in pursuance of a request under sub-section (1), considers that the statement does not contain adequate particulars of findings on material questions of fact, an adequate reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for the decision, the Court may order the person who furnished the statement to furnish to the person who made the request for the statement, within such time as is specified in the order, an additional statement or additional statements containing further and better particulars in relation to matters specified in the order with respect to those findings, that evidence or other material or those reasons.

(8) The regulations may declare a class or classes of decisions to be decisions that are not decisions to which this section applies.

(9) Regulations made under sub-section (8) may specify a class of decisions in any way, whether by references to the nature or subject matter of the decisions, by reference to the enactment or provision of an enactment under which they are made, by reference to the holder of the office by whom they are made, or otherwise.

(10) A regulation made under sub-section (8) applies only in relation to decisions made after the regulation takes effect.

(11) In this section, 'decision to which this section applies' means a decision is a decision to which this Act applies, but does not include-

(a) a decision in relation to which section 28 of the *Administrative Appeals Tribunal Act 1975* applies;

(b) a decision that includes, or is accompanied by a statement setting out, findings of facts, a reference to the evidence or other material on which those findings were based and the reasons for the decision; or

(c) a decision included in any of the classes of decision set out in Schedule 2.

APPENDIX C

SCHEDULE 1, AD(JR) ACT

Classes of decisions that are not decisions to which this Act applies

(a) decisions under the *Conciliation and Arbitration Act 1904* or the *Industrial Relations Act 1988*;

(c) decisions under the *Coal Industry Act 1946*, other than decisions of the Joint Coal Board;

(d) decisions under any of the following Acts:
Australian Security Intelligence Organization Act 1956
Australian Security Intelligence Organization Act 1979
Inspector-General of Intelligence and Security Act 1986
Telecommunications (Interception) Act 1979
Telephonic Communications (Interception) Act 1960;

(da) decisions under section 13 of the *Migration Act 1958*;

(e) decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or duty, or decisions amending, or refusing to amend, assessments or calculations of tax, charge or duty, under any of the following Acts:
Australian Capital Territory Taxation (Administration) Act 1969
Debits Tax Administration Act 1982
Coal Excise Act 1949
Customs Act 1901
Customs Tariff Act 1987
Estate Duty Assessment Act 1914
Excise Act 1901
Fringe Benefits Tax Assessment Act 1986
Gift Duty Assessment Act 1941
Income Tax Assessment Act 1936
Pay-roll Tax Assessment Act 1941
Pay-roll Tax (Territories) Assessment Act 1971
Petroleum Resource Rent Tax Assessment Act 1987
Acts providing for the assessment of sales tax
Taxation (Unpaid Company Tax) Assessment Act 1982
Training Guarantee (Administration) Act 1990
Trust Recoupment Tax Assessment Act 1985
Wool Tax (Administration) Act 1964;

(f) decisions of the Commissioner of Taxation under subsection 3E(1) of the *Taxation Administration Act 1953*;

(g) decisions under Part IV of the *Taxation Administration Act 1953*;

(h) decisions under the *Foreign Acquisitions and Takeovers Act 1975*;

(j) decisions, or decisions included in a class of decisions, under the Banking (Foreign Exchange) Regulations in respect of which the Treasurer has certified, by an instrument in writing, that the decision or any decision included in the class, as the case may be, is a decision giving effect to the foreign investment policy of the Commonwealth Government;

(l) decisions of the National Labour Consultative Council;

(m) decisions of the National Companies and Securities Commission made in the performance of a function, or the exercise of a power, conferred, or expressed to be conferred, upon it by any State Act or a law of the Northern Territory;

(n) decisions of the Ministerial Council for Companies and Securities established by Part VII of the agreement between the Commonwealth and the States a copy of which is set out in the Schedule to the *National Companies and Securities Commission Act 1979*;

(o) decisions under the *Defence Force Discipline Act 1982*;

(p) decisions under section 42 of the *Customs Act 1901* to require and take securities in respect of duty that may be payable under the *Customs Tariff (Anti-Dumping) Act 1975*;

(q) decisions under sub-section 25 (1) or Part IIIA of the *Commonwealth Electoral Act 1918*;

(r) decisions under the *Extradition Act 1988*

APPENDIX D

SCHEDULE 2, AD(JR) ACT

Classes of decisions that are not decisions to which Section 13 applies

(a) decisions in connection with, or made in the course of, redress of grievances, or redress of wrongs, with respect to members of the Defence Force:

(b) decisions in connection with personnel management (including recruitment, training, promotion and organization) with respect to the Defence Force, including decisions relating to particular persons;

(c) decisions under any of the following Acts:
Consular Privileges and Immunities Act 1972
Diplomatic Privileges and Immunities Act 1967
International Organizations (Privileges and Immunities) Act 1963;

(d) decisions under the *Migration Act 1958*, being-
  (i) decisions under section 11Q other than-
    (A) a decision relating to a person who, at the time of the decision, was, within the meaning of that Act, the holder of a valid visa; or
    (B) a decision relating to a person who, having entered Australia within the meaning of that Act, was in Australia at the time of the decision;
  (ii) decisions in connection with the issue or cancellation of visas;
  (iii) decisions whether a person is a person referred to in paragraph (b) of the definition of 'exempt non-citizen' in subsection 5(1) of that Act; or
  (iv) decisions relating to a person who, having entered Australia, within the meaning of that Act, as a diplomatic or consular representative of another country, a member of the staff of such a representative or the spouse or a dependent relative of such a representative, was in Australia at the time of the decision;

(e) decisions relating to the administration of criminal justice, and, in particular-
  (i) decisions in connection with the investigation or prosecutions of persons for any offences against a law of the Commonwealth or of a Territory;
  (ii) decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations;
  (iii) decisions in connection with the issue of search warrants under a law of the Commonwealth or of a Territory;
  (iv) decisions in connection with the issue of Writs of Assurance, or Customs Warrants, under the *Customs Act 1901*; and
  (v) decisions under a law of the Commonwealth or of a Territory requiring the production of documents, the giving of information or the summoning of persons as witnesses;

(f) decisions in connection with the institution or conduct of proceedings in a civil court, including decisions that relate to, or may result in, the bringing of such proceedings for the recovery of pecuniary penalties arising from contraventions of enactments, and, in particular-
  (i) decisions in connection with the investigation of persons for such contraventions;
  (ii) decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations;

(iii) decisions in connection with the issue of search warrants, Writs of Assistance or Customs Warrants under enactments; and

(iv) decisions under enactments requiring the production of documents, the giving of information or the' summoning of persons as witnesses;

(g) decisions of the Minister for Finance to issue sums out of the Consolidated Revenue Fund under an Act to appropriate moneys out of that Fund for the service of, or for expenditure in respect of, any year;

(h) decisions under section 32 or 36A of the *Audit Act 1901*;

(i) decisions of the Commonwealth Grants Commission relating to the allocation of funds;

(j) decisions of any of the following Tribunals: Academic Salaries Tribunal Defence Force Remuneration Tribunal Federal Police Arbitral Tribunal Remuneration Tribunal;

(k) decisions of any of the following authorities in respect of their commercial activities:
Aboriginal and Torres Strait Islander Commercial Development Corporation
Australian Dairy Corporation Australian Honey Board
Australian Industry Development Corporation
Australian Meat and Live-stock Corporation
Australian National Airlines Commission
Australian National Railways Commission
Australian Wheat Board
Australian Wool Corporation
Canberra Commercial Development Authority
Christmas Island Phosphate Commission
Commonwealth Bank of Australia
Commonwealth Banking Corporation
Commonwealth Development Bank of Australia
Commonwealth Savings Bank of Australia
Commonwealth Serum Laboratories Commission
Health Insurance Commission
Housing Loans Insurance Corporation;

(1) decisions of the Reserve Bank in connection with its banking operations (including individual open market operations and foreign exchange dealings);

(m) decisions in connection with the enforcement of judgments or orders for the recovery of moneys by the Commonwealth or by an officer of the Commonwealth;

(o) decisions of the National Director of the Commonwealth Employment Service made on behalf of that Service to refer, or not to refer, particular clients to particular employers;

(p) decisions under the *Civil Aviation Act 1988* that-

(i) relate to aircraft design, the construction or maintenance of aircraft or the safe operation of aircraft or otherwise relate to aviation safety; and

(ii) arise out of findings on material questions of fact based on evidence, or other material-

(A) that was supplied in confidence; or

(B) the publication of which would reveal information that is a trade secret;

(q) decisions in connection with personnel management (including recruitment, training, promotion and organization) with respect to the Australian Public Service or any other Service established by an enactment or the staff of a Commonwealth authority, other than a decision relating to, and having regard to the particular characteristics of, or other circumstances relating to, a particular person;

(r) decisions relating to promotions, transfers, temporary performance of duties, or appeals against promotions, elections for temporary performance of duties, of or by individual officers of the Australian Public Service;

(s) decisions relating to transfers or promotions under section 53A of the *Public Service Act 1922*;

(t) decisions relating to-

(i) the making of appointments in the Australian Public Service or any other Service established by an enactment or to the staff of a Commonwealth authority;

(ii) the engagement of persons as employees under the *Public Service Act 1922* or under any other enactment that establishes a Service or by a Commonwealth authority; or

(iii) the making of appointments under an enactment or to an office established by, or under, an enactment;

(u) decisions in connection with the prevention or settlement of industrial disputes, or otherwise relating to industrial matters, in respect of the Australian Public Service or any other Service established by an enactment or the staff of a Commonwealth authority;

(w) decisions relating to the making or terminating of appointments of Secretaries under the *Public Service Act 1922*;

(y) decisions relating to-

(i) engaging, or terminating engagements of, consultants; or

(ii) employing, or terminating the employment of, staff, under the *Members of Parliament (Staff) Act 1984*;

(z) decisions relating to promotions transfers, temporary performance of duties, or appeals against promotions or selections for temporary performance of duties, of or by individual members or staff members of the Australian Federal Police;

(za) determinations under section 26E of the *Australian Federal Police Force Act 1979* relating to individual members or staff members of the Australian Federal Police.